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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 184

ARKANSAS VALLEY G & T, INC., ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the case entitled *Salt River Project Agricultural Improvement & Power District, et al.* v. *Federal Power Commission, et al.*, 391 F. 2d 470 (CADC, Feb. 15, 1968), and the further judgment entered by that Court on March 14, 1968.[1]

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[1] The additional Petitioners herein are LaPlata Electric Association, Inc., Gunnison County Electric Association, Inc. and Yampa Valley Electric Association, Inc.

The additional Respondents herein are Dairyland Power Cooperative, Inc., Minnkota Power Cooperative, Inc., Committee of Rural Electric Cooperatives, Seven Statewide Associations of Rural Electric Cooperatives and Eighty-three Rural Electric Cooperatives.

CITATIONS TO OPINIONS BELOW

The opinion of the Federal Power Commission (*Salt River Project Agricultural Improvement and Power District, et al.* v. *Colorado-Ute Electric Association, Inc.,* Docket No. E-7306 (Jan. 5, 1967)). (R. 645), printed in Appendix A-III hereto, *infra,* p. 17a, is reported in 37 FPC 68. The Federal Power Commission's order denying Petitioners' Petition for Rehearing and Motion for Stay (R. 742), printed in Appendix A-IV hereto, *infra.* p. 22a, is reported at 37 FPC 495. The opinion of the Circuit Court of Appeals, printed in Appendix A-I hereto, *infra,* p. 1a, is reported in 391 F. 2d 470. The order of the Circuit Court of Appeals Denying the Petition for Rehearing, printed in Appendix A-II, was entered March 14, 1968. The opinion of the Federal Power Commission in *Dairyland Power Cooperative, et al.,* Opinion No. 511 (Jan. 5, 1967) a closely related case, is reported in 37 FPC 12, and is also printed as Appendix A (pp. 43 et seq.) to the Brief of Respondent Federal Power Commission filed with the Court below and contained in the record herein.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 15, 1968. Appendix A-I *infra,* p. 1a. Rehearing was denied on March 14, 1968. Appendix A-II *infra,* p. 16a. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether rural electric cooperatives, financed in whole or in part by the Rural Electrification Administration and engaged in the generation and the interstate transmission and wholesale sales of electric power and energy, are "public utilities" within the definition of the term "public utility" in the Federal Power Act

and therefore subject to regulation by the Federal Power Commission pursuant to that Act.

STATUTES INVOLVED

The statutory provisions involved are Section 3 of the Federal Water Power Act, Act of June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C., Sec. 791, and Sections 201 *et seq.* of the Federal Power Act, Act of August 26, 1935, 49 Stat. 838, 16 U.S.C., Secs. 791 a *et seq.* Relevant portions of these statutes are printed in Appendix B-I hereto, *infra,* pp. 25a-38a.

STATEMENT

These proceedings were commenced on August 17, 1966, when the Petitioners and other members of Colorado-Ute Electric Association, Inc.[2] (hereinafter referred to as Colorado-Ute), an interstate generation and transmission cooperative, financed in part by the Rural Electrification Administration, filed a Petition-Complaint against Colorado-Ute (R. 1) alleging that Colorado-Ute is a "public utility" within the meaning of that term as used in Section 201 of the Federal Power Act[3] since it owns and operates facilities subject to the jurisdiction of the Federal Power Commission and engages in the generation, transmission and sale of electric power and energy at wholesale for resale in interstate commerce.

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[2] Note: Petitioners herein were joined by Salt River Project Agricultural Improvement and Power District, San Miguel Power Association, Inc., White River Electric Association, Inc., San Luis Valley Rural Electric Cooperative, Inc., Holy Cross Electric Association, Inc., Bridger Valley Electric Association, Inc. and Grand Valley Rural Power Lines, Inc. in the proceedings before the Federal Power Commission. Empire Electric Association, also a member of Colorado-Ute, was not a party before the Federal Power Commission but intervened in the proceedings before the Court of Appeals.

[3] 16 U.S.C., sec. 824 (e).

Petitioners asserted that Colorado-Ute had not filed its wholesale rate schedules and service contracts with the Federal Power Commission or otherwise complied with the requirements imposed upon "public utilities" by the Federal Power Act and by regulations promulgated by the Commission pursuant to the Act.[4]

Petitioners further alleged that officials of Colorado-Ute had notified Petitioners and other members of the Association that Colorado-Ute would terminate and abandon or seriously curtail wholesale electric service to the Petitioners and other members of the Association and to an interstate power pool in compliance with a decision and order issued by the Supreme Court of the State of Colorado on February 14, 1966.[5]

Moreover, Petitioners asserted that, prior to such notice of termination, abandonment, change and/or cessation of service, Colorado-Ute had not requested or obtained permission from the Federal Power Commission for any change in service or rates (both of which would be affected by the termination or abandonment) or issued formal notice of same as required by the Federal Power Act[6] and the Regulations[7] thereunder.

Petitioners alleged that the termination, abandonment and cessation of service or change in rates or service as threatened by Colorado-Ute officials and the

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[4] See, *e.g.*, sec. 35.13 of the Regulations under the Federal Power Act. Printed in Appendix B-II hereto, *infra*, pp. 38a-44a.

[5] See *Western Colorado Power Co., et al.* v. *Public Utilities Commission of Colorado, et al.*, — Colo. —, 411 P. 2d 785, *cert. den.*, 385 U.S. 22 (1966).

[6] See sec. 205, 49 Stat. 851, 16 U.S.C., sec. 824d.

[7] See sec. 35.13 of the Regulations under the Federal Power Act, printed in Appendix B-II hereto, pp. 43a-44a.

failure of Colorado-Ute to comply with the rate and service schedule filing requirements were unauthorized and unlawful under the Federal Power Act and would result in irreparable harm to the Petitioners and other members of Colorado-Ute by depriving them of their source, in whole or in part, of electric power and energy in a five-state area including Colorado, Utah, Wyoming, New Mexico and Arizona. Moreover, the termination and abandonment of the affected facilities would also deprive the United States Bureau of Reclamation of the benefits of the interconnection of Colorado-Ute's electric system with the transmission system of the Colorado River Storage Project.

The Petitioners requested that the Commission assert and assume jurisdiction in the premises and require Colorado-Ute to file schedules showing rates and charges for all wholesale electric service and all contracts affecting such rates. Petitioners also requested that the Commission study and investigate the interstate power pool and the interconnection of transmission facilities, the adequacy and sufficiency of the interstate service provided by Colorado-Ute and the impact on such interstate service which would result from the abandonment of generation, transmission and substation facilities or the change of rates or wholesale electric service as threatened by officials of Colorado-Ute.

In response to the Petition-Complaint, Colorado-Ute filed an Answer on September 2, 1966 (R. 163), admitting all pertinent facts alleged in the Petition-Complaint. Colorado-Ute also tendered its rate schedules and service contracts for filing with the Commission subject to a final determination by the Commission as to whether cooperative associations, financed in whole

or in part by the Rural Electrification Administration, are "public utilities" as defined in the Federal Power Act.

On September 13, 1966, Colorado-Ute made an Initial Rate Filing (R. 179) as a public utility by tendering its rate schedules and service contracts to the Commission accompanied by a letter setting forth the request that such rate schedules and service contracts be permitted to become effective as of September 2, 1966, or as of such earlier date as the Commission may deem to be in the public interest.

On January 6, 1967, the Commission, in a decision, split 4 to 1 (Commissioner Bagge dissenting), entered its decision and order (R. 645) dismissing in part the Petition-Complaint and Answer with prejudice, holding that Colorado-Ute was not a "public utility" within the meaning of the Federal Power Act and that REA cooperatives are "Federal instrumentalities" and thus specifically exempt from regulation under the terms of the Act. On March 3, 1967, the Commission denied the Petitioners' Application for Rehearing and Motion for Stay (R. 742).

Thereafter, on May 2, 1967, Petitioners filed a Petition for Review of an Order of the Federal Power Commission with the United States Court of Appeals for the District of Columbia Circuit.

The Court below affirmed the opinion and order of the Federal Power Commission on February 15, 1968, holding that rural electric cooperatives, including Colorado-Ute Electric Association, are not "public utilities" within the meaning of the Federal Power Act and are not, therefore, subject to the jurisdiction of the Federal Power Commission. Appendix A-I, *infra,* p. 1a. On

March 14, 1968 the Court denied the Petition for Rehearing filed by Petitioners. Appendix A-II, *infra*, p. 16a.

REASONS FOR GRANTING THE WRIT

1. Clearly, the question presented is of considerable importance in the administration of the Federal Power Act and the regulation of the electric power industry. Moreover, it is a substantive question of Federal law not previously decided by this Court. The final settlement of this important Federal question by this Court is plainly in the public interest, since it is a question which affects a large segment of the electric power industry and one which is likely to be presented in numerous Federal Power Commission proceedings and in cases arising under the Federal Power Act, and is now presented in a number of cases presently pending or recently decided by the Commission or the United States Courts of Appeal.[8]

Moreover, the issue will arise repeatedly under different sections of the Federal Power Act as rural electric cooperatives enter or seek to enter into contractual

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[8] See, *e.g.*, *City of Paris, Kentucky* v. *Federal Power Commission, et al.*, No. 21375, (CADC, Argued May 24, 1968) (involving the status of Rural Electric Cooperatives under the Federal Power Act); *Alabama Power Co.* v. *Alabama Electric Cooperative*, No. 23016, — F. 2d — (5th Cir., decided April 2, 1968) (stating that rural electric cooperatives are instrumentalities of the United States); *Buckeye Power Inc. and Ohio Power Co.*, Docket No. E-7355 (decided Aug. 4, 1967) (holding that an association of rural electric cooperatives is a "public utility" under section 201 of the Federal Power Act); *Tri-State Generation and Transmission Association, Inc.* v. *The Public Service Commission, et al.*, No. 9232 (10th Cir., presently pending) (involving the question of State or Federal jurisdiction over wholesale rates of interstate generation and transmission cooperatives).

arrangements, pooling or interconnection agreements or similar relationships with other cooperatives, municipalities or with private investor-owned utilities which operate facilities acknowledged to be jurisdictional. At present, there is no consistent thread of decisions defining the status, rights, privileges and obligations of generation and transmission cooperatives which operate electric facilities on a large scale in interstate commerce.

Today, more than ever, rural electric cooperatives play a major role in the nation's economy, welfare and productivity.[9] Their development has been relatively recent and rapid.[10] This phenomenal development, which has taken place largely since World War II, has given rise not only to extensive distribution systems for purchased power and energy, but also to the formation of numerous large generation and transmission systems similar to that operated by Colorado-Ute. To date, some forty-three generation and transmission cooperatives have obtained REA loans for the development of generation and transmission facilities. During Fiscal Year 1967, the total energy input into cooperative electric systems was 56,377,122,000 kilowatt hours of energy.[11] More than twenty-three per cent (23%)

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[9] In 1967 rural electric borrowers numbered 1,103 furnishing 98.4% of the farms and rural areas of the United States with central station service. *Report of the Administrator, Rural Electrification Administration*, 1967, pp. 31, 33.

[10] In 1935, just prior to the institution of the REA program, 717,347 farms or 10.9 per cent of those in the United States were electrified. In 1963, 98.4 per cent of those in the United States were electrified. Wise, *Rural Electric Fact Book*, 1965, p. 12.

[11] *29th Annual Report of Energy Purchased by REA Borrowers*, REA Bulletin 111-2, 1967, p. 7.

of this energy (13,116,338,000 Kilowatt hours) was generated by REA borrowers under generation and transmission programs.[12]

Norman M. Clapp, Administrator of the Rural Electrification Administration noted in an address at the 1963 annual meeting of the National Rural Electric Cooperative Association, (NRECA) that:

> "The technology of the industry is moving so rapidly toward large-scale generation and the economies which flow from it that the maximum benefits from the industry can only come from a high degree of cooperation among its various segments—commercial, cooperative, and public." [13]

At the 1964 meeting of the NRECA, he stressed the need for developing more complex generation and transmission facilities on a larger scale to reduce the costs of power.[14] According to NRECA, ". . . most new REA loans are made for system improvements and expansion and for generation and transmission facilities." [15]

Interstate generation and transmission cooperatives not only furnish a considerable portion of the energy input to cooperative systems, but they also supply a much needed yardstick for measuring generation and transmission costs in the areas they serve. Moreover, generation and transmission cooperatives have substantially enhanced the competitive position of rural electric systems in their negotiations with commercial

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[12] Id.

[13] Wise, *Rural Electric Fact Book*, 1965, p. 107.

[14] Id. at p. 27.

[15] Id. at p. 95.

power companies for wholesale power. Their continuation as a viable segment of the electric industry is essential.

The system owned and operated by Colorado-Ute is exemplary of the type of large scale power operations engaged in by a growing number of interstate generation and transmission cooperatives. The undisputed facts in the record demonstrate that Colorado-Ute generates, transmits, and sells electric power and energy at wholesale for resale in a five state area and participates extensively in interstate power pooling and interconnection arrangements.

As these interstate generation and transmission cooperatives increase in size and importance, there is a corresponding need for adequate and consistent regulation of this portion of the industry. Absent effective regulation by the Federal Power Commission, these interstate utilities are subject to competing and conflicting regulation by state agencies in portions of the area served.[16] At best, the undesirable and unintended result is a complete void of effective regulation of this important segment of the industry. At worst, the result is piecemeal and potentially inconsistent regulatory activities by diverse state agencies which inevitably result in discrimination as between purchasers and discourage and impede the orderly, systematic and progressive development of the industry in a manner best suited to serve the public.

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[16] "Rural electric systems face many problems with regulation of electric utility rates by the States. It has been largely ineffective, resulting in many co-ops frequently paying exhorbitant wholesale rates when they buy power from intrastate electric utilities; or else cumbersome, withholding or delaying certification by the states of generating facilities needed by the co-ops." Wise, *Rural Electric Fact Book*, 1965, p. 128.

Petitioners submit that the solution to this problem is both available and apparent under the terms of existing law as set forth in the Federal Power Act. In this regard, the Federal Power Commission has specifically and repeatedly espoused the need for Federal regulation of interstate generation and transmission cooperatives, both in testimony before Congressional Committees [17] and in Commission decisions.[18]

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[17] See, *e.g.*, the statement of Joseph C. Swidler, Chairman, Federal Power Commission, Federal Power Commission Report on S. 1459, appended to the report of the Senate Committee on Commerce, *Exemption of Cooperatives from Federal Power Commission Jurisdiction*, S. Rep. No. 420, 89th Cong., 1st Sess. (July 1, 1965), wherein it is stated:

> It is, of course, not necessary that we express our views on the reach of the existing statute in order to comment on this Bill. We recognize that S. 1459 poses a different question; namely, whether cooperatives should be subject to FPC regulation irrespective of whether they are now subject to such jurisdiction.
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> . . . .
>
> We believe there is a substantial difference between the numerous small cooperatives engaged only in retail operations and the relatively few but individually large and increasingly important group of interstate cooperatives which generate and transmit power and sell it at wholesale to others. The latter, the so-called G & T cooperatives, service investor owned and municipal electric systems, as well as distribution cooperatives. Their operations bring them into interstate power pools and interchanges. We do not believe that it has been demonstrated that Federal law should not provide for Commission regulation of such operations or that Commission regulation would retard the program of the REA."

See also the more recent statement presented by Lee C. White, Chairman, testifying with regard to S. 1365 on June 6, 1967 before the Senate Committee on Commerce, wherein he referred to the present case and to the regulation of cooperatives as follows:

> That matter has been taken to the Court of Appeals in a related case and the Commission believes that no such legislation concerning jurisdiction over co-ops as is proposed in S. 1365 should be considered at this time. When legislation deal-

The Court of Appeals below, in deciding this case, pointed out that:

> . . . : "If the Commission had found that conditions in the power industry had so changed that generating cooperatives now did fall within its jurisdiction, this Court would be faced with a different issue. For just as the Commission's determination here that it is without jurisdiction is entitled to judicial deference, *Philadelphia Television Broddcasting Co.* v. *F.C.C.*, 123 U.S. App. D.C. 298, 359 F.2d 282 (1966), so would be its determination that it had the requisite authority. *Hardin* v. *Kentucky Utilities Company*, — U.S. —, 36 U.S.L. Week 4134 (January 16, 1968).[19]

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ing with the subject is considered, the Commission unanimously believes that there should be appropriate Federal jurisdiction over generation and transmission cooperatives which transmit electric energy in interstate commerce, but that distribution cooperatives should be exempt from FPC regulation.

[18] In the decision of *Dairyland Power Cooperative, et al.*, Opinion No. 511, 37 FPC 12, 67 PUR 3d 340 (Jan. 5, 1967), the Commission stated:

> . . . jurisdiction over major generating and transmission cooperatives in interstate commerce, as opposed to those that merely transmit and distribute electric energy (including those generating small amounts of power), would be in the public interest. These G & T cooperatives have become increasingly important in recent years in the amount of revenues realized and in power generated . . . Since the generating and transmission cooperatives have become an important segment of the interstate electric industry, at least in certain parts of the country, they should not be exempt from regulation.

See also *National Power Survey, A Report by the Federal Power Commission*, Part I, pp. 268-70, October, 1964.

[19] 391 F. 2d at 474, fn. 8.

Conditions in the power industry have changed and the need for effective regulation by the Federal Power Commission is nowhere more apparent than in the context of this case. The Federal Power Commission recognized these changes but nevertheless declined to follow the directive of Congress to exercise and discharge its regulatory responsibilities. Commissioner Bagge, in his dissenting opinion in *Dairyland Power Cooperative, et al.*,[20] a case dealing with the same question presented in this case, ably pointed this out:

> Congress no more sought to circumscribe the Act's coverage to 1935 operating conditions than it sought to foresee how every then-known method of interstate electric commerce might be changed in future years and to legislate in detail for each of those particular interstate systems based upon their peculiar corporate or operating conditions. Congress instead focused its attention upon the act of interstate commerce, and assumed that changed conditions would occur. Changes have occurred...
>
> Any interpretation of the Federal Power Act which is consonant with fairness and reason and with the plain meaning of the statute would, in my opinion, include respondents among those to be regulated by this Commission."

Commissioner Bagge further stated that:

> ". . . Congress established a pattern of Federal regulation of commerce which was intended to embrace all forms of interstate commerce in electricity as it existed or as it might be developed in the future as advances in power technology altered the nature of such commerce. The fact that the Respondents were not in existence in 1935 does not alter the fact that by subsequently engaging in

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[20] *Supra*, fn. 18.

> interstate transmission of electricity they have, thereby, become subject to the provisions of the Federal Power Act."

Commissioner Bagge emphasized the importance of this issue of Federal law and the need for its early resolution:

> This controversy . . . involves no idle academic exercise. It has real significance to the Nation. Its implications are exceedingly broad.
>
> Its implications relate directly to such vital national values as the achievement of economies of scale in the generation, transmission and distribution of electricity for the Nation, the marketing of interstate wholesale power at reasonable rates and upon fair and non-discriminatory terms, and the security and reliability of the Nation's electric power resources. It touches and concerns not only the nature and scope of the policies and objectives underlying the Federal Power Act specifically but addresses itself to the nature of the relationship between legislative policy and the administrative process generally. Its most profound implications deal with a philosophy of the law—with the nature of the legal function in our society.

The filing of this Petition is ". . . no idle academic exercise." This issue, as important and compelling as any current question arising under the Federal Power Act, is still unresolved. It is for this Court to settle this important question of Federal law.

2. The decision by the Court of Appeals below and the earlier decision by the Federal Power Commission are in direct conflict with the Commission's more recent ruling in *Buckeye Power Inc. and Ohio Power Co.*, Docket No. E-7355 (Aug. 4, 1967, reh. den. Aug. 28, 1967). In the *Buckeye* case, the Commission declared

that an association of twenty-eight rural electric cooperatives, each of which is financed wholly or in part by the Rural Electrification Administration, *is* a "public utility" under Section 201 of the Federal Power Act.

Petitioners submit that there is no adequate basis for distinguishing between Buckeye Power Inc. and Colorado-Ute Electric Association for purposes of determining their jurisdictional status under the Federal Power Act. The Court of Appeals made no effort to reconcile or explain these inconsistent rulings, although urged to do so in the Petition for Rehearing filed by the Petitioners.

It is also worthy of note that on the same day the Commission issued its decision in *Buckeye,* it further confused and confounded the law by issuing its decision in *City of Paris, Kentucky* v. *Kentucky Utilities Co.,* Docket No. E-7249 (August 4, 1967), holding on the authority of the *Dairyland* and *Salt River Project* cases, that rural electric cooperatives are "instrumentalities of the United States" and therefore exempt for all purposes from the Commission's regulatory authority. As pointed out elsewhere in this Petition, the *City of Paris* case was appealed to the United States Court of Appeals for the District of Columbia Circuit,[21] argued on May 24, 1968, and is pending decision.

Neither the instant case or the *City of Paris* case can be reconciled with the Commission's decision in the *Buckeye* case.

Moreover, in deciding the instant case, the Court of Appeals failed to reach or make any disposition of the

[21] No. 21375. See fn. 8, *supra.*

Commission's additional holding that Colorado-Ute and all other rural electric cooperatives are "instrumentalities of the United States", and are therefore specifically exempt from the terms and conditions of the Federal Power Act. In this regard, Petitioners submit that a full review of the jurisdictional status of rural electric cooperatives by this Court would not be complete or meaningful without taking cognizance of this important underlying issue.

As Petitioners pointed out in their briefs and arguments before the Court of Appeals, the Commission's holding on this second issue is in direct conflict with decisions on this point generally [22] and with the decision of the Ninth Circuit Court of Appeals in *City of Anchorage* v. *Chugach Electric Association*, 252 F.2d 412 (1958) specifically wherein the Court held that:

> The Electric Association is not an agency of the United States Government simply by virtue of an 'arrangement' with the Rural Electrification Administration pursuant to 7 U.S.C.A. §§ 901-915. The Rural Electrification Administration is the government agency. The associations to whom it provides funds and other assistance are not. By no concept or canon of construction can the recipient of Federal aid in this situation be considered a 'government instrumentality' . . .[23]

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[22] See, *e.g.*, *United States* v. *Boyd*, 378 U.S. 39 (1964); *Buckstaff Bath House Co.* v. *McKinley*, 308 U.S. 358 (1939); *Federal Compress & Warehouse Co.* v. *McLean*, 291 U.S. 17 (1934); *Fox Film Corp.* v. *Doyal*, 286 U.S. 123 (1932); *Unemployment Comp. Com'n.* v. *Jefferson S. L. Ins. Co.*, 215 N. Car. 794, 2 S.E. 2d 584 (1939); *Unemployment Comp. Com'n.* v. *Wachovia Bank & P. Co.*, 215 N. Car. 491, 2 S.E. 2d 592 (1939).

[23] 252 F. 2d at 419.

Recently, the Fifth Circuit Court of Appeals, citing and relying upon the Commission's rulings in the *Dairyland* and *Salt River Project* cases and ignoring the explicit ruling in the *Chugach Electric Association* case, characterized cooperatives as "instrumentalities of the United States." [24]

Thus, the present and potential conflicts upon this issue persist in the rulings of the Courts of Appeal and the Federal Power Commission. Only a comprehensive review, analysis and final decision by this Court can reconcile these divergent holdings. Petitioners submit that the present case presents an excellent and appropriate vehicle for reaching such a decision.

3. Petitioners submit that the decision of the court below is erroneous. Colorado-Ute and other similar interstate generation and transmission cooperatives do engage in the interstate business of transmitting and selling electric energy for ultimate distribution to the public as "public utilities" as that term is used and intended in the Federal Power Act.[25] Congress clearly intended that jurisdiction under the Act is to be determined accordingly to the nature of the facilities

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[24] See *Alabama Power Company* v. *Alabama Electric Cooperative, Inc. et al.*, Opinion No. 23016, — F. 2d — (5th Cir., April 2, 1968).

[25] Section 201(e), 16 U.S.C., sec. 824 (e), defines "public utility" to include "any person who owns or operates facilities subject to the jurisdiction of the Commission . . ." Section 3(4), 16 U.S.C., sec. 796(4), defines "person" to include "corporations". Section 3(3), 16 U.S.C., sec. 796(3), defines "corporation" to include "any corporation, joint stock company, partnership, association, business trust, [or] organized group of persons, whether incorporated or not . . ."

owned and operated in interstate commerce.[26] Even the Court of Appeals conceded that:

> . . . REA cooperatives, such as Colorado-Ute, do seem to fall within the ambit of the Act's central phrase, "public utilities." [27]

Notwithstanding the clarity of the definitional sections of the Act and the clear application of these definitions to interstate generation and transmission cooperatives such as Colorado-Ute, the Court chose to ignore the plain language of the Act and to examine the "logic" of such language in reaching the conclusion that cooperatives are not subject to the regulatory jurisdiction of the Commission under the Federal Power Act.

The Court, in examining the "logic" of the Act, found little assistance in reviewing the legislative history of either the Federal Power Act or the Rural Electrification Act.[28] The Court concluded that:

> The legislative history of the Rural Electrification Act, like that of the Federal Power Act, sheds little light on the specific question of whether Congress intended the Federal Power Commission's jurisdiction to extend to REA-financed cooperatives.[29]

The Court characterized the few references to the Federal Power Act in the legislative history of the

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[26] Section 201(b), 16 U.S.C., sec. 824(b), provides in pertinent part, that the "Commission shall have jurisdiction over all facilities for [the] transmission [in interstate commerce] or sale [in interstate commerce at wholesale] of electric energy . . ."

[27] 391 F. 2d at 474.

[28] 49 Stat. 1365, 7 U.S.C., sec. 901 *et seq.*

[29] 391 F. 2d at 475-76. See also 391 F. 2d 474, fn. 9.

Rural Electrification Act as ". . . turgid, unrevealing and ambiguous." [30]

Yet, without so much as a single compelling statement in the legislative history of the Act, the Court appears to find support for its conclusion in (1) the circumstances prevailing at the time of passage of the Act; (2) the conclusion that the Commission's decision ". . . is consistent not only with over 30 years of administrative practice under the Federal Power Act, but also with 30 years of administration of the Rural Electrification Act," [31] and (3) the conclusion that cooperatives are "effectively self-regulating" and that regulation by the Federal Power Commission would conflict with the authority and responsibilities of the Rural Electrification Administration.

Petitioners submit that none of these factors supports the *ratio decidendi* of the Court's decision or justifys a departure from the plain and unambiguous terms of the Act.

First, it is true, of course, that there was no need for regulation of cooperatives existing at the time of passage of the Federal Power Act. Indeed, there were no cooperatives owning and operating jurisdictional facilities at that time.[32] The growth of interstate generation and transmission cooperatives was sporadic and slow until the latter part of the 1950's and early 1960's. By 1963, when the Commission first initiated proceedings to regulate Dairyland Power Cooperative, Minn-

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[30] 391 F. 2d at 476.

[31] 391 F. 2d at 476.

[32] Note: The Rural Electrification Act was signed into law on May 20, 1936, but the first G & T loan was not made by the Rural Electrification Administration until Mareh 11, 1938.

kota Power Cooperative and South Central Power Cooperative (a local distribution cooperative),[33] the number of generation and transmission cooperatives had risen to 43, with a total generating capacity of some 119,470 KW.[34] In a most logical and lucid memorandum of law provided at the Commission's request, the General Counsel of the Federal Power Commission then advised the Commission that such cooperatives were operating jurisdictional facilities and should be brought within the ambit of the Commission's jurisdiction.[35]

Petitioners submit that the lack of any assertion of jurisdiction prior to 1963 should be attributed to the fact that there were virtually no interstate generation and transmission cooperatives in this country which needed comprehensive regulation. Until that time, rural electric cooperatives, with few exceptions, engaged almost exclusively in the local distribution of purchased power by means of facilities which could not be considered jurisdictional.

It is Petitioners' contention that once generation and transmission cooperatives commenced to generate and sell electric power at wholesale in interstate commerce, they became, by definition, "public utilities" and the need for regulation and compliance with the Federal Power Act became necessary. The Commission, in ap-

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[33] The Petitioners have not contended during these proceedings and do not now contend that local distribution cooperatives are subject to Federal Power Commission jurisdiction under the Federal Power Act.

[34] Wise, *Rural Electric Fact Book*, 1965, p. 17.

[35] See Opinion of the General Counsel re Federal Power Commission Jurisdiction Over Cooperative Borrowers from the Rural Electrification Administration, May 20, 1963.

parent recognition of this need and requirement, properly issued its show cause orders to the aforementioned cooperatives in 1963.

Second, the treatment of rural electric cooperatives by the Federal Power Commission over the past thirty years has not been as consistent as the Court below was apparently led to believe. The inconsistent and seemingly irreconcilable decisions of the Commission upon this jurisdictional question are discussed in other portions of this Petition.[36] But even assuming that the Commission's interpretation of the Act upon this issue had been historically consistent, its discretion to interpret and determine the parameters of its jurisdiction under the Act is not so broad as to permit the abandonment of its regulatory responsibilities in the face of a clear directive of Congress. To sanction this gross exercise of discretion is tantamount to conferring upon the Commission the authority and power to "engraft[ed] a blanket exemption upon the Act . . ." and to exercise the ". . . Congressional power of repeal."[37] Petitioners submit that the Commission's ". . . declination of jurisdiction was contrary to the intent of Congress, was arbitrary, and was beyond its power."[38]

Third, contrary to the findings and conclusions reached by the Court of Appeals,[39] interstate generation and transmission cooperatives, such as Colorado-Ute, are not effectively self-regulating; do not limit membership exclusively to consumers; and do not limit their service essentially to members. Furthermore, Peti-

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[36] See part 2, *supra*.

[37] *Office Employees International Union* v. *National Labor Relations Board*, 353 U.S. 313, 315 and 321 (1957).

[38] Id. See also *Hotel Employees* v. *Leedom*, 358 U.S. 99 (1956).

[39] 391 F. 2d at 473.

tioners submit that there is no irreconcilable or inherent conflict between the regulatory functions of the Commission and the administrative functions of the Rural Electrification Administration.

As pointed out by Petitioners in the proceedings below, Colorado-Ute Electric Association, in wholesaling electric power, serves various classes of customers including consuming cooperatives, other wholesaling cooperatives, governmental or quasi-governmental bodies (Salt River Project), the Federal Government (Bureau of Reclamation), and a private investor-owned utility (Public Service Company of Colorado).

The Supreme Court of the State of Colorado, in earlier proceedings involving Colorado-Ute,[40] made the following findings which are directly contrary to those assumed by the Court of Appeals.

> It [Colorado-Ute] furnishes electrical energy which is used by countless consumers in a very large segment of this state. The widespread interest of the public is clearly shown . . .[41]
>
> * * *
>
> Under regulation, an electric consumer need not be a member of a cooperative to secure its service. Likewise a consumer located in an area exclusively served by such cooperative must take its service if indeed service is to be received at all. The form of organization delivering service makes no difference whatever to these consumers . . .[42]

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[40] *Western Colorado Power Company, et al.* v. *Public Utilities Commission of Colorado, et al.*, — Colorado —, 411 P. 2d 785, cert. den., 385 U.S. 22 (1966).

[41] 411 P. 2d at 795.

[42] Id.

Moreover, the Colorado members of Colorado-Ute are required by law to provide service to the public generally and each has amended its by-laws to reflect the availability of such service to all consumers located within the area served by that member.

Thus, it is clear that Colorado-Ute and other similar interstate generation and transmission cooperatives do engage in the interstate business of transmitting and selling electric energy for ultimate distribution to the public as "public utilities" as that term is used and intended in the Federal Power Act.

Further, the Court's preoccupation and concern over the potential conflict between Federal Power Commission jurisdiction and the administration of the Rural Electrification Act was unnecessary. The Rural Electrification Act provides no regulatory scheme or program remotely similar to that covering other bulk power suppliers under the Federal Power Act. A careful reading of the Rural Electrification Act and its legislative history belies the argument that Congress intended to give general regulatory authority to the Rural Electrification Administration. What Congress intended and accomplished was the establishment of a Federal authority to receive appropriations for the purpose of dispensing loans primarily to non-profit cooperative associations for the purpose of acquiring, constructing and operating facilities to introduce electricity to rural America.[43]

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[43] See, e.g., letter of Administrator Morris Cooke to the Chairman, Committee on Agriculture and Forestry, February 3, 1936; remarks by Senator Norris (sponsor and floor manager of the proposed Rural Electrification Act), 80 Cong. Rec. 2751; remarks of Chairman Rayburn, 80 Cong. Rec. 5283; remarks of Congressman Withrow, 80 Cong. Rec. 5279; and remarks of Congressman Wolverton, 80 Cong. Rec. 5293.

Under the Rural Electrification Act the Administrator is: "... authorized and empowered ... to make loans for rural electrification."[44] A notice published in the *Federal Register* reiterates and summarizes the functions of the Administration.[45] The Administrator occupies the role of mortgagee, lender or banker[46] which necessarily precludes him or his administration from rendering effective and impartial regulation of the systems which the REA finances.

It is unreasonable to assume that Congress intended either to confer the powers and responsibilities of regulation upon the "financier" of rural electric systems or to create the resulting jurisdictional void.

In the absence of any comprehensive program of regulation, one must conclude that interstate generation and transmission cooperatives are either wholly unregulated, except with regard to the approval of loans and securities, or that Congress has left the regulation of cooperatives exclusively to the several states under state laws. Petitioners submit that either result is equally inconsistent with the avowed purpose and intent of Congress in enacting the Federal Power Act.

Furthermore, the fact that the Federal Power Commission and the Rural Electrification Administration can work together in apparent harmony is amply

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[44] Act of May 20, 1936, 49 Stat. 1365, as amended, 7 U.S.C., sec. 904.

[45] 32 *Fed. Reg.* 10917 (July 22, 1967).

[46] See *Davenport* v. *White Mountain Power Co.*, 92 N.H. 20, 24 A. 2d 474 (1942) wherein the court stressed the fact that the Rural Electrification Administration performs the functions of a banker rather than engaging in the business of constructing and maintaining power lines.

demonstrated in the *Buckeye Power Inc. and Ohio Power Company* proceedings, *supra,* wherein the Commission held that an association of rural electric cooperatives was a "public utility" subject to Commission jurisdiction. The Commission's decision in *Buckeye* never mentions the potential conflict of functions, responsibility and authority as between the Federal Power Commission and the Rural Electrification Administration. Petitioners submit that the potential conflict between the FPC and the REA in the context of the present case is no more serious than in *Buckeye.*[47]

In summary, the Petitioners contend that it was unnecessary and erroneous for the Court to reject the plain language of the statute and resort to an investigation of Congressional "logic" and other uncertain interpretive aids to determine the Act's impact and scope. As Mr. Justice Cardozo admonished, problems of statutory construction require making ". . . a choice between uncertainties. We must be content to choose the lesser."[48] Here the Court and the Commission have made such extravagant use of the legislative background and circumstances of the Act ". . . as to give point to the quip that only when legislative history is doubtful do you go to the statute."[49]

As pointed out by Mr. Justice Holmes in *Pine Hill Coal Co.* v. *United States,* 259 U.S. 191, 196 (1922): "It is a delicate business to base speculations about the

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[47] The Commission has gone on record, as shown in the report on S. 1459 (see footnote 17, *supra*), as follows: "We do not believe that it has been demonstrated that Federal law should not provide for Commission regulation of such operations or that Commission regulation would retard the program of the REA."

[48] *Burnet* v. *Guggenheim,* 288 U.S. 280, 288 (1933).

[49] Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 528, 543 (1947).

purposes or construction of a statute upon the vicissitudes of its passage." Petitioners submit that the opinions of both the Commission and the Court of Appeals in the proceedings below are based upon and tainted by such speculation in their search for legislative purpose.

Petitioners urge this Court to invoke and apply the fundamental canon of statutory construction which teaches that the plain and unambiguous wording of a statute is the primary and most reliable source of legislative intent. This rule should be followed and applied even where, as here, Congress may not have foreseen the particular conclusion resulting from the application of the literal terms of the statute.[50]

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[50] See *Barr* v. *United States*, 374 U.S. 84, 90 (1945), wherein the Court stated that:

> . . . if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the Legislatures.

APPENDIX

APPENDIX

APPENDIX A

COPIES OF OPINIONS AND JUDGMENTS BELOW

I. Opinion of the United States Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,960

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, *et al., Petitioners*

v.

Federal Power Commission, *Respondent*

MINNKOTA POWER COOPERATIVE, INC., COMMITTEE OF RURAL ELECTRIVE COOPERATIVES, DAIRYLAND POWER COOPERATIVE, HOLY CROSS ELECTRIC ASSOCIATION, INC., and EMPIRE ELECTRIC ASSOCIATION, *Intervenors*

Petition to Review an Order of the Federal Power Commission

Decided February 15, 1968

Mr. Wallace L. Duncan, with whom *Mr. Stephen A. West* was on the brief, for petitioners; also entered an appearance for intervenors Holy Cross Electric Association and Empire Electric Association.

Mr. William H. Arkin, Attorney, Federal Power Commission, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Peter H. Schiff*, Solicitor, Federal Power Commission, was on the brief, for respondent. *Messrs. Richard A. Solomon*, General Counsel, and *Israel Convisser*, Attorney, Federal Power Commission, also entered appearances for respondent.

Mr. Reuben Goldberg for intervenor Minnkota Power Cooperative, Inc.

Mr. William C. Wise for intervenor Committee of Rural Electric Cooperatives.

Mr. Floyd E. Wheeler for intervenor Dairyland Power Cooperative.

Before BAZELON, *Chief Judge*, and WRIGHT and ROBINSON, *Circuit Judges*.

WRIGHT, *Circuit Judge:* The Colorado-Ute Electric Association, Inc., respondent before the Federal Power Commission, is a non-profit cooperative association financed in large part with loans from the Rural Electrification Administration and organized under Colorado law. It is engaged in the generation, transmission and interstate sale of electric energy at wholesale. Its only customers are its 13 members who wholly own and control the Association and its electric system. Twelve of these 13 member-owners are themselves electric cooperatives engaged in the distribution and sale of electric energy to their consumer-owners in Colorado, Arizona, Utah, Wyoming and New Mexico, while the 13th, Salt River Project Agricultural Improvement and Power District, is a *quasi*-governmental arm of the State of Arizona. Nine of these cooperatives, along with Salt River, initiated the proceedings before the Commission which culminated in the order now under review.

In their "Petition and Complaint" the member-owners of Colorado-Ute named Colorado-Ute as respondent and sought an order from the Commission asserting jurisdiction over it as a "public utility" within the meaning of Parts II and III of the Federal Power Act[1] and requiring it to

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[1] 16 U.S.C. §§ 791a *et seq.* (1964 ed.). Section 201(e) of the Act, 16 U.S.C. § 824(e), provides:

> "The term 'public utility' when used in sections 824-825r of this title means any person who owns or operates facilities subject to the jurisdiction of the Commission under sections 824-824h of this title."

And see Note 10 *infra*.

file its rate schedules for the transmission and sale of electric energy for resale in interstate commerce.

In Paragraph (5) of their petition and complaint, Colorado-Ute's member-owners request that the Commission assume jurisdiction pursuant to its emergency authority "to require by order that the Respondent Colorado-Ute continue the generation, transmission, distribution, delivery, interchange and sale of electric power and energy at wholesale in interstate commerce at the Hayden Plant, *the decision and order of the Supreme Court of Colorado to the contrary notwithstanding,*" (Emphasis added.) The Colorado Supreme Court, in *Western Colorado Power Co.* v. *Public Utilities Com'n of Colorado,* 159 Colo. 262, 411 P.2d 785, *appeal dismissed and cert. denied,* 385 U.S. 22 (1966), had ordered cancellation of a certificate of convenience and necessity previously issued by the Colorado Public Utilities Commission in 1963 giving Colorado-Ute authority to operate a 150,000-kilowatt normal (sic) capacity thermal generating plant at Hayden, Colorado.[2] These facilities were completed in July 1965 and have been in operation since. They are essential in providing the member-owners of Colorado-Ute with wholesale electric power and energy.

Petitioners' objective in their friendly suit before the Commission against their own Association was to nullify the Colorado Supreme Court's decision ordering cessation of the Hayden generating plant operations.[3] In its answer,

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[2] An accommodation has apparently been worked out between Colorado-Ute and the privately owned power companies which fought its first certificate of public convenience and necessity for its Hayden station, and the Colorado Public Utilities Commission has now issued a second certificate which seems to meet with their approval. (Decision No. 70608, December 22, 1967.) Nevertheless the case here is not mooted.

[3] Petitioners apparently hoped that if the Commission asserted jurisdiction over Colorado-Ute as a public utility and over its sales of Hayden-generated electric energy in interstate commerce, the Colorado law requirement of certification of facilities for the production of electric energy would be inapplicable to the plant.

Colorado-Ute admitted all the allegations in the complaint, except that it was a public utility as defined in the Act (as to which it merely requested a determination of its status), and it conditionally proffered for filing all of its contracts and rate schedules with its members. Petitioners, with Colorado-Ute's concurrence, then submitted the issues presented to the Commission on the pleadings and moved for a "final" decision without intermediate reference to a hearing examiner.

Meanwhile there was pending before the Commission a proceeding commenced in July 1963 to determine generally whether non-profit REA-financed rural electric cooperatives, like Colorado-Ute, should be required to comply with the Commission's reporting, accounting and rate schedule filing requirements as "public utilities" under the Act. *Dairyland Power Cooperative et al.,* Docket No. E-7113 (July 22, 1963). Extensive hearings were held in which many REA-financed cooperatives intervened and set forth numerous reasons why they should not be considered "public utilities" under the Act even if they own or operate facilities for transmission or sale of electric energy in interstate commerce. The Secretary of Agriculture, on behalf of REA, intervened in support of the cooperatives' position. On January 5, 1967, the Commission issued its opinion finding that cooperatively-owned electric suppliers financed by REA do not fall within the scope of the Commission's regulatory jurisdiction over "public utilities." *Dairyland Power Cooperative,* Docket No. E-7113, 37 F.P.C. 12 (1967). The Commission concluded:

> "* * * Congress never intended this Commission to regulate cooperatives under the Federal Power Act. This intention is reflected in the legislative history of the Federal Power Act, is confirmed by the legislative history of the Rural Electrification Act, is strengthened by subsequent expressions by the Congress and is ratified by this Commission's legislative interpretation.

Over the past 30 years, these factors compel the conclusion that cooperatives financed by REA are not public utilities within the meaning of Part II of the Federal Power Act." 37 F.P.C. at 15.

Relying on its decision in *Dairyland,* the Commission on January 6, 1967, dismissed the petition and complaint of Colorado-Ute's member-owners and directed return of the rate schedules and service contracts Colorado-Ute had tendered. Petitioners subsequently filed for a rehearing and stay which were denied by the Commission on March 3, 1967. Petitioners now appeal to this court for review of the Commission's January 6 and March 3 orders.

I

Though review here is not strictly of the Commission's *Dairyland* decision, the issues are precisely the same, and a determination that Colorado-Ute is a public utility under Parts II and III of the Act would topple the *Dairyland* determination as to REA-financed rural electric cooperatives generally. It is against this larger backdrop that the competing claims of the petitioners and the Commission must be appraised.

There are now nearly 1,000 rural electric cooperatives which own and operate electric systems financed by the United States, acting through REA, pursuant to the Rural Electrification Act of 1936. Approximately 45 of these cooperatives, such as Colorado-Ute, own and operate electric generating plants as well as transmission systems. The remainder simply own and operate distribution systems and buy the power and energy from others.

The Rural Electrification Administration which finances these cooperatives was first established by executive order [4]

[4] Executive Order No. 7037, issued May 11, 1935. The Rural Electrification Act, providing a statutory basis for the Administration, was enacted the following year. 7 U.S.C. §§ 901 *et seq.* (1964 ed.).

in 1935 to "initiate, formulate, administer, and supervise a program of approved projects with respect to the generation, transmission, and distribution of electric energy in rural areas." The objective was to provide electricity to those sparsely settled areas which the investor-owned utilities had not found it profitable to service. To this end REA makes long-term low-interest loans to approved nonprofit cooperatives organized and owned by their consumer members, usually farmers, who have been unable to obtain electricity from any other source.

Through its lending authority REA exercises extensive supervision over the planning, construction and operation of the facilities it finances. The REA borrower as a condition of securing its loan must secure REA approval of its manager, engineer and counsel; of its construction contracts and contracts for purchase of materials, equipment and supplies; of its contracts for purchase and sale of power; of its insurance coverage, its purchase of land, and so on.[5] Moreover, REA's concern is not only with providing high standards of electric service and guaranteeing its loan, but also with reducing the cost of service to the cooperative's consumers. It furnishes retail rate schedules designed for rural use and assists distribution cooperatives in obtaining electric energy at reasonable costs.

Though REA regulation and supervision of cooperatives are, in many respects, far more comprehensive than that which the Federal Power Commission exercises over investor-owned utilities, there are certain areas, such as rate-making, where the cooperatives enjoy a freer hand. But it is in these areas that, by their structural nature, the cooperatives are effectively self-regulating. They are completely owned and controlled by their consumer-members, and only consumers can become members. They are non-

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[5] 32 FED. REG. 10817 (July 22, 1967). *And see* testimony of Edward Wilson, Deputy Assistant Administrator of REA, in *Dairyland Power Cooperative et al.*, Docket No. E-7113.

profit.[6] Each member has a single vote in the affairs of the cooperative, and service is essentially limited to members. No officer receives a salary for his services and officers and directors are prohibited from engaging in any transactions with the cooperative from which they can earn any profit.

The question, then, before the Commission in *Dairyland* and before this court now with respect to Colorado-Ute is whether Congress intended these peculiar entities, obviously quite unlike investor-owned utilities and subject to comprehensive regulation by another branch of the federal government, to be treated as public utilities within Parts II and III of the Federal Power Act. In *Dairyland* the Commission concluded that Congress did not so intend or, alternatively, even if the REA-financed cooperatives were public utilities under the Act, they were exempt from its coverage as instrumentalities of the Government under Section 201(f).[7] One day later the Commission applied its broad *Dairyland* ruling to Colorado-Ute in particular. We affirm that determination on the ground that Colorado-Ute, as an REA-financed cooperative, is not a public utility within the meaning of Parts II and III of the Federal Power Act.

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[6] Most of them have devolved a "capital credits" plan by which all money over and above that required for operating costs is credited back to the member-owners who paid it in. Consequently neither the cooperative nor any individual can profit from the sale of electricity by the cooperative to its members.

[7] Section 201(f), 16 U.S.C. § 824(f), provides:

> "No provision in sections 824-824h of this title shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto."

II.

In reaching its decision in *Dairyland,* the Commission examined the legislative history of both the Federal Power Act of 1935 and the Rural Electrification Act of 1936 and the relationship between the Acts themselves. It also considered its continuous 30-year administrative practice of non-regulation of REA-financed cooperatives and the congressional response to this practice, and concluded that Congress never intended it to regulate cooperatives under the Federal Power Act.[8]

In arguing that Colorado-Ute is subject to Commission regulation under Parts II and III of the Federal Power Act, petitioners' principal reliance is on the Act's plain language.[9] And admittedly REA cooperatives, such as Colorado-Ute, do seem to fall within the ambit of the Act's

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[8] The Commission went on to issue a precatory word to Congress, pointing out that jurisdiction over certain aspects of the major generating and transmission cooperatives, as opposed to those which merely transmit, distribute or generate only a small amount of electric energy, would be in the public interest. *Dairyland Power Cooperative,* 37 F.P.C. 12, 27-28 (1967). If the Commission had found that conditions in the power industry had so changed that generating cooperatives now did fall within its jurisdiction, this court would be faced with a different issue. For just as the Commission's determination here that it is without jurisdiction is entitled to judicial deference, *Philadelphia Television Broadcasting Co.* v. *F.C.C.,* 123 U.S.App.D.C. 298, 359 F.2d 282 (1966), so would be its determination that it had the requisite authority. *Hardin* v. *Kentucky Utilities Company,* — U.S. —, 36 U.S.L. WEEK 4134 (January 16, 1968).

[9] The legislative history of the Federal Power Act with respect to its bearing on electrical cooperatives is virtually nonexistent, for when the Act was passed in 1935 the Rural Electrification Administration had been created by executive order only a few months before and, prior to the Act, had made only a few very small loans to proposed cooperatives. The agency was not permanently established until Congress enacted the Rural Electrification Act in 1936, one year after the Federal Power Act.

central phrase, "public utilities."[10] But in reviewing the Commission's disclaimer of jurisdiction over cooperatives, our concern is not simply with Congress' language, but with its logic as well. For statutes, as the Supreme Court has said, are "instruments of government," not "exercises in literary composition," *United States* v. *Shirey*, 359 U.S. 255, 260 (1959), and "[d]eparture from a literal reading of statutory language may * * * be * * * necessary in order to effect the legislative purpose." *Malat* v. *Riddell*, 383 U.S. 569, 571-572 (1966). We must look through the statute itself to what lay behind it.[11]

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[10] Section 201(e), 16 U.S.C. § 824(e), defines "public utility" to include "any person who owns or operates facilities subject to the jurisdiction of the Commission * * *." Section 3(4), 16 U.S.C. § 796(4), defines "person" to include "corporations." Section 3(3), 16 U.S.C. § 796(3), defines "corporation" to include "any corporation, joint-stock company, partnership, association, business trust, [or] organized group of persons, whether incorporated or not * * *." Section 201(b), 16 U.S.C. § 824(b), provides, in pertinent part, that the "Commission shall have jurisdiction over all facilities for [the] transmission [in interstate commerce] or sale [in interstate commerce at wholesale] of electric energy * * *."

[11] As Judge Hand memorably put in *Cabell* v. *Markham*, 2 Cir., 148 F. 2d 737, 739, *affirmed*, 326 U.S. 404 (1945):

> "* * * Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. * * *"

The Public Utility Act, of which the Federal Power Act was Title II,[12] emanated from an investigation conducted between 1928 and 1935 by the Federal Trade Commission at the direction of the Senate. This investigation disclosed rampant abuses in the investor-owned electric utility industry, and the F.T.C. did not mince its words in its report to Congress:

> "In the last analysis the foregoing practices and the conditions which they have created must be judged not only by economic results but by ethical standards. It is not easy to choose words which will adequately characterize various ethical aspects of the situation without an appearance of undue severity. Nevertheless the use of words such as fraud, deceit, misrepresentation, dishonesty, breach of trust, and oppression are the only suitable terms to apply if one seeks to form an ethical judgment on many practices which have taken sums beyond calculation from the rate paying and investing public." (Footnote omitted.) SUMMARY REPORT OF THE FEDERAL TRADE COMMISSION TO THE SENATE OF THE UNITED STATES, Document 92, Part 73-A, 70th Cong., 1st Sess., p. 63 (1935).

The F.T.C. chronicled at length the venal conditions and iniquitous practices it had uncovered in the course of its investigation. These included manipulative practices permitting maximum control of operating facilities with minimum investment, arbitrary or imaginative overstating of fixed capital accounts to support excessive utility rate charges and in consequence to encourage the sale of value-

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[12] Title I, designated the Public Utility Holding Company Act, 15 U.S.C. § 79 (1964 ed.), vests authority in the Securities and Exchange Commission to deal with the abuses arising from the holding company structure which then prevailed in the utilities industry.

inflated securities, disregard of prudent financing practices, creation of fictitious profits by means of unreal inter-company transactions and other similar devices, use of deceptive or unsound methods of accounting, manipulation of security markets, and exaction of excessive payments from operating companies for services rendered to them.

But of the 19 major abuses summarized, virtually none could be associated with the cooperative structure where ownership and control is vested in the consumer-owners. Consequently, the attention of the 74th Congress, in enacting the Federal Power Act, was focused on the sorts of evils associated exclusively with investor-owned utilities. It is not so surprising, therefore, that the same Congress which was soon to enact the Rural Electrification Act, then lurking in committee, paid such scant attention to it in passing the Federal Power Act.

The two Acts were aimed at wholly disparate problems and the supervisory agencies established under them were to deal with fundamentally different sorts of utilities. For, in contrast to the Federal Power Act, the Rural Electrification Act which was conceived contemporaneously was not the response to a need for reform in an immense and corrupted industry, but rather constituted simply an attempt, through rural electrification cooperatives, to bring economical electric power to the nine out of ten farms that were then without it.[13]

The legislative history of the Rural Electrification Act, like that of the Federal Power Act, sheds little light on the specific question of whether Congress intended the Federal Power Commission's jurisdiction to extend to REA-financed cooperatives. It is true that the debates in Congress over the proposed Rural Electrification Act do contain several references to the Federal Power Act passed the previous year. But, again, they are turgid, unrevealing and ambig-

[13] 2 1955 U.S. Code Cong. & Adm. News 2041-2042, 84th Cong., 1st Sess.

uous. In fact Congress' apparent lack of attention to any significant relationship between the Commission and the Rural Electrification Administration is doubtless more suggestive than anything to be found in the legislative history itself. For if REA cooperatives were to be made subject to Commission jurisdiction, Commission conflict with the authority of the Rural Electrification Administration was inevitable. Consequently this apparent indifference indicates that those entities under the Administrator's jurisdiction—the REA-financed cooperatives—were not intended to fall within that of the Commission. If anything the emphasis in Congress was on the Administrator's need for "almost unlimited discretion" and "extraordinary power" if he were to oversee effectively the rural electrification program.[14] We think the congressional unconcern with the impact of the "other" statute on the one it was enacting, coupled with the fact that the statutes are directed at very different problems, strongly supports the Commission's position that it is without jurisdiction over REA-financed cooperatives under Parts II and III of the Act.

Still further strengthening the Commission's interpretation is the fact that it is consistent not only with over 30 years of its administrative practice under the Federal Power Act, but also with 30 years of administration of the Rural Electrification Act.[15] Moreover, these are practices of which Congress has been well aware, but with which it has never tampered. Until the Commission raised the issue, *sua sponte*, in *Dairyland*, it had not formally considered the applicability of its manifold powers under Parts

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[14] 80 CONG. REC. (Part 3) 3308, 3313 (1936). *See also id.* (Part 5) at 5277, 5281.

[15] The repeated administrative practice of the Rural Electrification Administration in consistently affirming that agency's independence of the Commission has never been criticized by the successive Congresses to which it is by statute directed to report annually of its progress and activities.

II and III of the Act to REA cooperatives. Though there have been occasional, infrequent findings of public utility status of REA cooperatives in proceedings which involved them only tangentially as facets of the Commission's delegated power over true investor-owned public utilities,[16] the Commission has never sought to exercise general regulatory authority over them.[17] And though there have been amendments to the Federal Power Act introduced in Congress, some of which would have impinged on REA jurisdiction

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[16] *See, e.g., Teton Valley Power and Milling Co., Ltd.*, 24 F.P.C. 361 (1960); *Frontier Power Co.*, 9 F.P.C. 1298 (1950); *Montana-Dakota Utilities Co.*, 8 F.P.C. 869 (1949); *Ark-La Electric Cooperative, Inc.*, 6 F.P.C. 1037 (1947).

All ten cases cited by petitioners involved voluntary filings by cooperatives in proceedings where "no issue was raised as to the status of cooperatives as public utilities * * *." *Dairyland Power Cooperative, supra* Note 8, 37 F.P.C. at 25 n. 30.

Petitioners also rely on two recent judicial decisions, *Public Service Co. of Indiana, Inc.* v. *Federal Power Com'n*, 7 Cir., 375 F. 2d 100, *cert. denied*, 387 U.S. 931 (1967), and *Arkansas Power & Light Co.* v. *Federal Power Com'n*, 8 Cir., 368 F. 2d 376 (1966), to support their argument that REA-financed cooperatives are public utilities within the meaning of Part II of the Federal Power Act. But those cases simply hold that sales by public utilities to a cooperative are within the protection of the Act against unreasonable rates. Neither holds that cooperatives are themselves public utilities as defined in Part II. And in the Shrewsbury case (*New England Power Company* v. *Federal Power Commission*, 1 Cir., 349 F. 2d 258 (1965)) the court held that municipally owned-utilities, which are expressly exempt from Part II of the Federal Power Act by Section 201(f), can nevertheless invoke the Act's protective provisions when they are resale customers of a non-exempt utility.

[17] The Commission has not required cooperatives to file rates or maintain records or uniform accounts; nor has it considered the reasonableness of their rates or charges; it has not fixed adequate or proper rates of depreciation, or sought to exercise its investigative powers with respect to cooperatives; it has not asserted jurisdiction over the sale of one cooperative's facilities to another, and so on.

and others of which would have proclaimed its independence,[18] none has been enacted. Petitioners argue that Congress' inaction in affirming the independent status of REA cooperatives *vis-a-vis* the Federal Power Commission indicates that legally no such independence exists. But though it is hazardous to draw any conclusion from congressional inertia, particularly with respect to a variety of bills with diverse objectives, we think that, if anything, Congress' inaction here tends to demonstrate its endorsement of the long continued administrative practice of the agencies in operating independently of each other.

The dispositional persuasiveness of such long established administrative practices is augmented where, as here, they were initiated "by the men charged with the responsibility of setting [the statute's] machinery in motion,'" *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 540 (1940), and where, as here, the interpretive aid of specific legislative history is unavailing. *Philadelphia Television Broadcasting Co.* v. *F.C.C.,* 123 U.S.App.D.C. 298, 300, 359 F.2d 282, 284 (1966).[19] We think the Commission

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[18] The more recent amendatory attempts seem to have been prompted by the Commission's order to show cause in the *Dairyland* case. The sponsors of these bills conceived them as *confirming* the cooperatives' independent status which seemed threatened by the *Dairyland* show cause order. In introducing S. 2028, Senator Humphrey explained: "The law is clear. We would not need new legislation except for the stubbornness of some people who are pursuing an illegal course in the face of the provisions of the law in this case, as expressly stated by Congress." 109 CONG. REC. (Part 11) 14533 (1963). *See also* the debate on S. 1459, 111 CONG. REC. (Part 16) 22018-22034 (1965).

[19] *See also McLaren* v. *Fleischer,* 256 U.S. 477, 481 (1920), where the Supreme Court said: "[T]he practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons." *And see Udall* v. *Tallman,* 380 U.S. 1, 18 (1965).

was right in looking beyond the words of the statute to its underlying purpose and in concluding that Colorado-Ute did not fall within its jurisdiction.[20]

Affirmed.

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[20] Courts have repeatedly stressed that legislation should be interpreted in a way "consonant with the functions sought to be served by [it] * * *." *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 489 (1947). *See also Malat* v. *Riddell*, 383 U.S. 569, 571-572 (1966); *United States* v. *Shirey*, 359 U.S. 255, 260-261 (1959); *United States* v. *Ruzicka*, 329 U.S. 287, 292 (1946); *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44 (1946); *Markham* v. *Cabell*, 326 U.S. 404, 409 (1945); *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543-544 (1940); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459-462 (1892); *Shaffer* v. *Singh*, 120 U.S. App. D.C. 42, 44, 343 F. 2d 324, 326 (1965).

II. Order of the United States Court of Appeals for the District of Columbia Circuit Denying Petition for Rehearing

[Filed March 14, 1968]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1967

No. 20,960

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT and POWER DISTRICT, *et al.*, *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

MINNKOTA POWER COOPERATIVE, INC.,
THE COMMITTEE OF RURAL ELECTRIC COOPERATIVES,
DAIRYLAND POWER COOPERATIVE,
HOLY CROSS ELECTRIC ASSOCIATIONS and
EMPIRE ELECTRIC ASSOCIATION, *Intervenors*.

Before: BAZELON, *Chief Judge;* WRIGHT and ROBINSON *Circuit Judges,* in Chambers.

ORDER

On consideration of petitioner's petition for rehearing, it is

ORDERED by the Court that petitioner's aforesaid petition is denied.

Per Curiam.

III. Opinion and Order of the Federal Power Commission Dismissing in Part Petitions and Returning Wholesale Rate Submittals

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

Docket No. E-7306

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT and POWER DISTRICT, *et al.*

v.

COLORADO-UTE ELECTRIC ASSOCIATION, INC.

Order Dismissing in Part Petitions and Returning Wholesale Rate Submittals

(Issued January 6, 1967)

By Opinion No. 511 issued January 5, 1967, *Dairyland Power Cooperative, et al.*, the Commission determined that cooperatively-owned electric suppliers financed by the Rural Electrification Administration (REA) do not fall within the scope of this Commission's regulatory jurisdiction over "public utilities" within the meaning of that term in Section 201 of the Federal Power Act.

The subject proceeding presents, among others, the same question that we resolved in *Dairyland* for Colorado-Ute Electric Association, Inc. (Ute), Montrose, Colorado, is an interstate electric generation and transmission cooperative financed in part by the REA. For the reasons set forth in *Dairyland* we hold that Ute is not a public utility subject to our jurisdiction. Accordingly, we dismiss the petition of Salt River Project Agricultural Improvement and Power

District (Salt River), Phoenix, Arizona, and others [1] filed August 17, 1966 and Ute's answer filed September 2, 1966, insofar as that question is raised. Also, we are directing the Secretary to return to Ute certain wholesale rate schedule submittals which the Cooperative proffered for filing on September 13, 1966 pursuant to Part 35 of the Commission's Regulations under the Power Act.

Salt River's petition requests this Commission to assert regulatory authority over Ute under Parts II and III of the Power Act. Their stated objective is to force Ute, whom they contend is a "public utility" within the meaning of the Power Act, to continue operating and maintaining its existing 150,000 kw steam electric generating plant at Hayden, Colorado, (Hayden Plant), and related electric transmission facilities. Numerous provisions of Parts II and III of the Power Act are referred to in the petition.

The Hayden Plant and related transmission facilities were constructed by Ute under a certificate of public convenience and necessity issued by the Colorado Public Utilities Commission in 1963, *Re Colorado-Ute Electric Association, Inc.*, 48 PUR3d 113, but set aside by the Colorado Supreme Court on February 14, 1966, *Western Colorado Power Company, et als.* v. *Public Utilities Commission of Colorado, et als.*, — Colo. —, 411 P. 2d 785, rehearing denied 411 P. 2d 805. Review of the Colorado Supreme Court's decision was refused by the United States Supreme Court on October 24, 1966, *Colorado-Ute Electric Association, Inc.* v. *Western Colorado Power Company et als.*, No.

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[1] LaPlata Electric Association, Inc., Durango, Colorado; San Miguel Power Association, Inc., Nucla, Colorado; White River Electric Association, Inc., Meeker, Colorado; Holy Cross Electric Association, Inc., Glenwood Springs, Colorado; Gunnison County Electric Association, Inc., Crested Butte, Colorado; Yampa Valley Electric Association, Inc., Steamboat Springs, Colorado; Grand Valley Rural Power Lines, Inc., Grand Junction, Colorado; and Arkansas Valley G & T, Inc., Pueblo, Colorado.

437, October Term 1966. Rehearing was denied December 5, 1966. Pending review by the United States Supreme Court, the State Supreme Court stayed execution of its decision by order dated March 14, 1966.

Salt River and the other petitioners allege that if Ute ceases to provide service from the Hayden Plant and related transmission facilities, electric service to them will be seriously impaired or disrupted and that the Commission can and should find the existence of an emergency within the meaning of Section 202(c) of the Federal Power Act and enter an appropriate order or orders for continued operation of such plant and facilities.

The Power Act contains no requirement that the party whose service is the subject of a petition brought under the provisions of Section 202(c) be a "public utility".[2] Hence, the petition and Ute's answer should not be dismissed insofar as they are grounded upon the provisions of Section 202(c) of the Power Act.

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[2] Section 202(c) of the Federal Power Act reads as follows:

> During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.

On November 1, 1966 a joint petition to intervene in this proceeding was filed by Bridger Valley Electric Association, Inc., Mountain View, Wyoming, and San Luis Valley Rural Electric Cooperative, Inc., Monte Vista, Colorado, members of Ute. Bridger Valley and San Luis join in the petition filed August 17, 1966 by Salt River and certain other members of Ute. To the extent Bridger Valley and San Luis raise questions which we dismiss as to Salt River and other petitioners, it is appropriate that their November 1, 1966 petition be dismissed. It is retained in the files of the Commission only insofar as it raises issues under Section 202(c) of the Power Act.

By motion filed September 8, 1966, Salt River and other petitioners seek a "final" decision by the Commission without intermediate decision by a presiding officer, request an opportunity to submit proposed findings and conclusions to the Commission, and reserve the right to apply to the Commission for rehearing and to petition for judicial review. Ute concurs in the motion to the extent that it requests a waiver of the intermediate decision procedure and a "final" decision by the Commission. To the extent that the procedural requests relate to issues raised under Section 202(c), it is appropriate that this motion remain before us for further consideration. All other issues raised in the motion of September 8, 1966, are hereby dismissed in accordance with the order.

The Commission finds:

(1) The Colorado-Ute Electric Association, Inc., is an interstate electric generation and transmission cooperative financed in part by the REA.

(2) Colorado-Ute is not a "public utility" within the meaning of that term as used in Section 201 of the Federal Power Act.

(3) The petitions filed August 17, 1966 and November 1, 1966, and Ute's answer filed September 2, 1966, should be

dismissed with prejudice except insofar as they raise issues cognizable under Section 202 (c) of the Federal Power Act and the related procedural sections of that Act. Further, the wholesale schedules tendered for filing by Ute should be returned.

The Commission orders:

(A) The petitions filed August 17, 1966 and November 1, 1966, and Ute's answer filed September 2, 1966, as referred to above, are hereby dismissed with prejudice except insofar as they raise issues cognizable under Section 202 (c) of the Federal Power Act and the related procedural sections of that Act.

(B) The wholesale rate schedule submittals, as referred to above, shall be returned to Ute by the Secretary of the Commission. The return of one copy of each such submittal shall be deemed compliance with this order.

By the Commission.

(S E A L)

GORDON M. GRANT
Acting Secretary.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, *et al.*

v.

COLORADO-UTE ELECTRIC ASSOCIATION, INC.

(Issued January 6, 1967)

Docket No. E-7306

BAGGE, Commissioner, *concurring* in part and *dissenting* in part:

I dissent from that part of the order which finds that the Commission has no jurisdiction over Colorado-Ute under Section 201 of the Federal Power Act for the reasons expressed in my concurring and dissenting statement in

Dairyland Power Cooperative, et al., Docket No. E-7113, Opinion No. 511, issued January 5, 1967.

I concur in that part of the order which retains jurisdiction of the proceeding insofar as it raises issues cognizable under Section 202(c) of the Federal Power Act.

CARL E. BAGGE

IV. Order of the Federal Power Commission Denying Application for Rehearing and Motion for Stay

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

Docket No. E-7306

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, ET AL.

v.

COLORADO-UTE ELECTRIC ASSOCIATION, INC.

Order Denying Application for Rehearing and Motion for Stay

(Issued March 3, 1967)

Salt River Project Agricultural Improvement and Power District (Salt River), Phoenix, Arizona, and 10 other members[1] of Colorado-Ute Electric Association, Inc. (Ute),

[1] LaPlata Electric Association, Inc., Durango, Colorado; San Miguel Power Association, Inc., Nucla, Colorado; White River Electric Association, Inc., Meeker, Colorado; Holy Cross Electric Association, Inc., Glenwood Springs, Colorado; Gunnison County Electric Association, Inc., Crested Butte, Colorado; Yampa Valley Electric Association, Inc., Steamboat Springs, Colorado; Grand Valley Rural Power Lines, Inc., Grand Junction, Colorado; Arkansas Valley G&T, Inc., Pueblo, Colorado; San Luis Valley Rural Electric Cooperative, Inc., Monte Vista, Colorado; and Bridger Valley Electric Association, Inc., Mountain View, Wyoming.

Montrose, Colorado, on February 3, 1967, filed an application for rehearing and motion for stay of the Commission's order issued January 6, 1967, in the above-entitled proceeding.

By our order of January 6, 1967, we dismissed with prejudice (1) a petition filed against Ute by Salt River and other members of Ute, (2) Ute's answer to the petition, and (3) a joint petition for leave to intervene filed by Bridger Valley Electric Association, Inc., and San Luis Valley Rural Electric Cooperative, Inc.,[2] except insofar as those pleadings "raise issues cognizable under Section 202(c) of the Federal Power Act and the related procedural sections of that Act." In addition, our order directed that certain wholesale rate schedules proffered for filing by Ute pursuant to Part 35 of the Commission's Regulations under the Power Act be returned to Ute by the Secretary of the Commission.

The application for rehearing presents no questions which were not fully explored in the Commission's Opinion in the Dairyland case, (Opinion No. 511, issued January 5, 1967, *Dairyland Power Cooperative, et al.*) or which call for a different conclusion here as to Ute's status as a "public utility", and will therefore be denied. This leaves for consideration the stay request, which, *inter alia,* is sought for the period of judicial review of our order. If we believed that denial of a stay could irreparably injure the movants we might well grant them the requested relief. But this is not the case. In the absence of judicial reversal (or new legislation giving us the jurisdiction over Ute as we do not believe we have now) we will not take any action, arising either out of the petition and complaint or the rate filing tender, which is dependent upon Ute's status as a "public utility". Consequently, the only practical effect of

[2] Bridger Valley and San Luis Valley are members of Ute, but they were not included among the original petitioners in this proceeding.

a stay would be to lodge one extra copy of the rate filing with the Commission. It is clear that this ministerial action would have no legal or practical effect. If it is determined upon review that Ute is a "public utility" within the meaning of the Federal Power Act, its wholesale rates to its customers necessarily will be treated as if they had been filed as of the date of the original tender (or in the Commission's discretion the earlier date sought by Ute) and the situs of the paper on which the filing was made in the interim will be irrelevant.[3]

The Commission finds:

(1) The assignments of error and grounds for rehearing set forth in the above-described application for rehearing of the order of January 6, 1967, present no facts or principles of law which were not considered by the Commission when it issued the order or which, having now been considered, warrant any change or modification of the order.

(2) The above-described motion for stay of the order of January 6, 1967, should be denied.

The Commission orders:

(A) The above-described application for rehearing of the Commission's order of January 6, 1967, is denied.

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[3] By separate order issued concurrently herewith in this proceeding, the Commission is granting the petitions for leave to intervene filed by the Secretary of Agriculture (Secretary), Dairyland Power Cooperative (Dairyland), Minnkota Power Cooperative, Inc. (Minnkota), and a group which includes various rural electric cooperatives, various Statewide Associations of Electric Cooperatives, and a Committee of Rural Electric Cooperatives (Cooperatives, Statewides, and Committee). The Cooperatives, Statewides and Committee stated that they would not oppose Salt River's motion for stay. Dairyland stated that it would oppose the motion for stay. The Secretary and Minnkota were silent concerning that motion.

(B) The above-described motion for stay of the Commission's order of January 6, 1967, is denied.

By the Commission. Commissioner Bagge dissenting for reasons stated in his dissent to the order issued January 6, 1967.

(SEAL)

JOSEPH H. GUTRIDE,
Secretary.

APPENDIX B

STATUTES AND REGULATIONS

I. Relevant Sections of the Federal Water Power Act, Approved June 10, 1920 (41 Stat. 1063, as Amended, 16 U.S.C., 791 et seq.) and the Federal Power Act, Approved August 26, 1935 (49 Stat. 838, 16 U.S.C., Secs. 791a-825r)

SECTION 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * *

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined:

* * *

(4) "person" means an individual or a corporation;

[41 Stat. 1063, as amended, 16 U.S.C., sec. 796 (1958)]

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists

of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any polit-

ical subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. [49 Stat. 847, 16 U.S.C. 824]

* * * *

SECTION 202. [*As amended August 7, 1953.*] (a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after

opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

(c) During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connection of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.

(d) During the continuance of any emergency requiring immediate action, any person engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: *Provided,* That such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: *Provided further,* That upon approval of the Commission permanent connections for emergency use only may be made hereunder. [49 Stat. 848, 67 Stat. 461, 16 U.S.C., Sec. 824a]

* * *

SECTION 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient

form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before

or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [49 Stat. 851, 16 U.S.C. 824d]

* * *

SECTION 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, prac-

tice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. [49 Stat. 852, 16 U.S.C. 824e]

• • •

SECTION 207. Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. [49 Stat. 853, 16 U.S.C. 824f]

• • •

SECTION 306. *Complaints.* Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such

licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper. [49 Stat. 856, 16 U.S.C. 825e]

* * *

SECTION 307. *Investigations by Commission; Attendance of Witnesses; Depositions* (a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this Act or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this Act or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this Act relates. The Commission may permit any person to file with it a statement in writing under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject.

* * *

SECTION 309. *Administrative Powers of Commission; Rules, Regulations, and Orders.* The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in the Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within

which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [49 Stat. 858, 16 U.S.C. 825h]

* * *

SECTION 311. *Investigations Relating to Electric Energy.* In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale or electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the

development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section. [49 Stat. 859, 16 U.S.C. 825j]

* * *

SECTION 314. *Enforcement of act, regulations and orders.* (a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this Act, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this Act or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this Act.

(b) Upon application of the Commission the district courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this Act or any rule, regulation, or order of the Commission thereunder.

(c) The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending

before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission. [49 Stat. 861, 49 Stat. 1921; 16 U.S.C. 825m]

* * *

SECTION 315. *General forfeiture provision; venue.*

(a) Any licensee or public utility which willfully fails, within the time prescribed by the Commission, to comply with any order of the Commission, to file any report required under this Act or any rule or regulation of the Commission thereunder, to submit any information or document required by the Commission in the course of an investigation conducted under this Act, or to appear by an officer or agent at any hearing or investigation in response to a subpena issued under this Act, shall forfeit to the United States an amount not exceeding $1,000 to be fixed by the Commission after notice and opportunity for hearing. The imposition or payment of any such forfeiture shall not bar or affect any penalty prescribed in this Act but such forfeiture shall be in addition to any such penalty.

(b) The forfeitures provided for in this Act shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States, brought in the district where the person is an inhabitant or has his principal place of business, or if a licensee or public utility, in any district in which such licensee or public utility transacts business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this Act. The costs and expenses of such prosecution shall be paid from the appropriations for the expenses of the courts of the United States. [49 Stat. 861; 16 U.S.C. 825n]

* * *

SECTION 316. *General penalties.*

(a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this Act, or any rule or regulation imposed by the Secretary of the Army under authority of Part I of this Act shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs. [49 Stat. 862; 16 U.S.C. 825o]

SECTION 317. *Jurisdiction of Offenses; Enforcement of Liabilities and Duties.*

The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this Act o rthe rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability of duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder. Any criminal proceedings shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in

such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this Act. [49 Stat. 862, 49 Stat. 1921; 16 U.S.C. 825p]

* * * *

II. Regulations Under the Federal Power Act in Effect March 31, 1964

SECTION 35.1. *Application; obligation to file rate schedules.*

(a) Every public utility shall file with the Commission and post, in conformity with the requirements of this part, full and complete rate schedules, as defined in § 35.2(b), clearly and specifically setting forth all rates and charges for any transmission or sale of electric energy subject to the jurisdiction of this Commission, the classifications, practices, rules and regulations affecting such rates and charges and all contracts which in any manner affect or relate to such rates, charges, classifications, services, rules, regulations or practices, as required by section 205(c) of the Federal Power Act (49 Stat. 851; 16 U.S.C. 824d(c)). Where two or more public utilities are parties to the same rate schedule, each public utility transmitting or selling electric energy subject to the jurisdiction of this Commission shall post and file such rate schedule, or the rate schedule may be filed by one such public utility and all other parties having an obligation to file may post and file a certificate of concurrence on the form indicated in § 131.52 of this chapter: *Provided, however,* In cases where two or more public utilities are required to file rate schedules or certificates of concurrence such public utilities may authorize a designated representative to file upon behalf of all parties if upon written request such parties have been granted Commission authorization therefor.

(b) A rate schedule applicable to a transmission or sale of electric energy, other than that which proposes to supersede, supplement, cancel or otherwise change the provisions of a rate schedule required to be on file with this Commission, shall be filed as an initial rate in accordance with § 35.12.

(c) A rate schedule applicable to a transmission or sale of electric energy which proposes to supersede, supplement, cancel or otherwise change any of the provisions of a rate schedule required to be on file with this Commission (such as providing for other or additional rates, charges, classifications or services, or rules, regulations, practices or contracts for a particular customer or customers) shall be filed as a change in rate in accordance with § 35.13, except Notices of Cancellation or Termination which shall be filed as a change in accordance with § 35.15.

(d) No public utility shall, directly or indirectly, demand, charge, collect or receive any rate, charge or compensation for or in connection with electric service subject to the jurisdiction of the Commission, or impose any classification, practice, rule, regulation or contract with respect thereto, which is different from that provided in a rate schedule required to be on file with this Commission unless otherwise specifically provided by order of the Commission for good cause shown.

* * *

SECTION 35.2. *Definitions.*

(a) *Electric service.* The term "electric service" as used herein shall mean the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale for resale in interstate commerce, and may be comprised of various classes of capacity and energy sales and/or transmission services. "Electric service" shall include the utilization of facilities owned or operated by any public utility to effect any of the foregoing sales or services

whether by leasing or other arrangements. As defined herein, "electric service" is without regard to the form of payment or compensation for the sales or services rendered whether by purchase and sale, interchange, exchange, wheeling charge, facilities charge, rental or otherwise.

(b) *Rate schedule.* The term "rate schedule" as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, regulations or contracts which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing and may take the physical form of a contractual document, purchase or sale agreement, lease or facilities, tariff or other writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof.

(c) *Filing date.* The term "filing date" as used herein shall mean the date on which a rate schedule filing is completed by the receipt in the office of the Secretary of all supporting cost and other data required to be filed in compliance with the requirements of this part, unless such rate schedule is rejected as provided in § 35.5. If the material submitted is found to be incomplete, the Secretary will so notify the filing utility within 30 days of the receipt of the submittal.

(d) *Posting.* The term "posting" as used herein shall mean, (1) keeping a copy of every rate schedule of a public utility as currently on file, or as tendered for filing, with the Commission open and available during regular business hours for public inspection in a convenient form and place at the public utility's principal and district or division offices in the territory served, and (2) mailing to each purchaser under a rate schedule a copy of such rate schedule on the date it is sent to this Commission for filing. Posting shall include, in the event of the filing of increased rates or

charges, the mailing to each purchaser under a rate schedule or schedules proposed to be changed and to each State Commission within whose jurisdiction such purchaser or purchasers distribute and sell electric energy at retail, a copy of the rate schedule showing such increased rates or charges, comparative billing data as required under this part, and, if requested by a purchaser or State Commission, a copy of the supporting data required to be submitted to this Commission under this part. Upon direction of the Secretary, the public utility shall serve copies of rate schedules and supplementary data upon designated parties other than those specified herein.

(e) *Effective date.* As used herein the "effective date" of a rate schedule shall mean the date on which a rate schedule filed and posted pursuant to the requirements of this part is permitted by the Commission to become effective as a filed rate schedule. The effective date shall be 30 days after the filing date, or such other date as may be specified by the Commission.

* * *

SECTION 35.3. *Notice requirements.*

(a) All rate schedules or any part thereof shall be tendered for filing with the Commission and posted not less than thirty days nor more than ninety days prior to the date on which the electric service is to commence and become effective under an initial rate schedule or the date on which the filing party proposes to make any change in electric service and/or rate, charge, classification, practice, rule, regulation or contract effective as a change in rate schedule, except as provided in paragraph (b) of this section, or unless a different period of time is permitted by the Commission. Nothing herein shall be construed as in any way precluding a public utility from entering into agreements which, under this section, may not be filed at the time of execution thereof by reason of the aforementioned 30 to 90 day prior filing requirements. The proposed

effective date of any rate schedule filing having a "filing date" in accordance with § 35.2(c) may be deferred at the written request of the filing public utility submitted to the Secretary prior to its acceptance by the Commission.

(b) Rate schedules predicated on the construction of facilities may be tendered for filing and posted no more than 90 days prior to the date set by the parties for the contract to go into effect.

The Commission, upon request and for good cause shown, may permit a rate schedule or part thereof to be tendered for filing and posted more than 90 days before it is to become effective.

* * *

SECTION 35.4. *Permission to become effective is not approval.*

The fact that the Commission permits a rate schedule or any part thereof or any notice of cancellation to become effective shall not constitute approval by the Commission of such rate schedule or part thereof or notice of cancellation.

* * *

SECTION 35.11. *Waiver of notice requirement.*

Upon application and for good cause shown, the Commission may, by order, provide that a rate schedule, or part thereof, shall be effective as of a date prior to the date of filing or prior to the date the rate schedule would become effective in accordance with these rules. Application for waiver of the prior notice requirement shall show (a) how and the extent to which the filing public utility and purchaser(s) under such rate schedule, or part thereof, would be affected if the notice requirement is not waived, and (b) the effects of the waiver, if granted, upon purchasers under other rate schedules. The filing public utility requesting

such waiver or notice shall serve copies of its request therefor upon all purchasers.

* * *

SECTION 35.12. *Filing of initial rate schedules.*

(a) The letter of a public utility transmitting to the Commission for filing an initial rate schedule shall list the documents submitted with the filing; give the date on which the service under that schedule is expected to commence; state the names and addresses of those to whom the rate schedule has been mailed; contain a brief description of the kinds of services to be furnished at the rates specified therein; and summarize the circumstances which show that all requisite agreement to the rate schedule or the filing thereof, including any contract embodied therein, has in fact been obtained. In the case of coordination and interchange arrangements in the nature of power pooling transactions, all supporting data required to be submitted in support of a rate schedule filing shall also be submitted by parties filing certificates of concurrence, or a representative to file supporting data on behalf of all parties may be designated as provided in § 35.1.

* * *

SECTION 35.13. *Filing of changes in rate schedules.*

(a) The letter of a public utility transmitting to the Commission for filing a rate schedule, or part thereof, to supersede, supplement or otherwise change the provisions of a rate schedule required to be on file with the Commission, shall list the documents submitted with the filing; give the date on which the filing public utility proposes to make the changes in service and/or rate, charge, classification, rule, regulation, practice or contract effective, state the names and addresses of those to whom copies of the rate schedule has been mailed; include a brief description of the proposed changes in service and/or rate, charges, etc.; state the reasons for the proposed changes; and summarize the circumstances which show that all requisite agreement

to the rate schedule or the filing thereof, including any contract embodied therein, has in fact been obtained. In the case of coordination and interchange arrangements in the nature of power pooling transactions, all supporting data required to be submitted in support of a rate schedule filing shall also be submitted by parties filing certificates of concurrence, or a representative to file supporting data on behalf of all parties may be designated as provided in § 35.1.

* * *

SECTION 35.15. *Notices of cancellation or termination.*

When a rate schedule or part thereof required to be on file with the Commission is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, each party required to file the schedule shall notify the Commission of the proposed cancellation or termination on the form indicated in § 131.53 of this chapter at least thirty days but not more than ninety days prior to the date such cancellation or termination is proposed to take effect. A copy of such notice to the Commission shall be duly posted. With such notice each filing party shall submit a statement giving the reasons for the proposed cancellation or termination, and a list of the affected purchasers to whom the notice has been mailed. For good cause shown, the Commission may by order provide that the notice of cancellation or termination shall be effective as of a date prior to the date of filing or prior to the date the filing would become effective in accordance with these rules.

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1522

ARKANSAS VALLEY G. & T. INC., et al., *Petitioners,*

v.

FEDERAL POWER COMMISSION, et al., *Respondents.*

MOTION OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Tri-State Generation and Transmission Association, Inc., hereinafter referred to as Tri-State, respectfully moves for leave to file a brief *amicus curiae* in this case. The consent of the attorney for Petitioners has been obtained, and a copy of such consent has been filed with the Clerk of the Court. The consent of the attorney for Respondent Federal Power Commission, while sought, has neither been given nor denied and the consent of the attorneys for the remaining Respondents, also sought, has been denied.

The interest of Tri-State in this case arises from the following:

1. Tri-State is a Colorado corporation which has also qualified to do business in the states of Wyoming and Nebraska. It has twenty-eight members, all of which are either cooperative associations or public utility districts

in the three states. Tri-State is engaged, generally, in the interstate purchase, sale, and transmission of electric energy, as a wholesaler to its members only in the aforesaid three states. It is financed by the Rural Electrification Administration of the Department of Agriculture of the United States. It annually sells more kilowatt hours of energy to its members than any other generation and transmission cooperative (hereinafter called G and T) in the United States.

2. Tri-State has a problem directly related to the instant matter which is simply explained. In 1965, the Board of Directors of Tri-State authorized the construction of certain transmission lines in the states of Nebraska and Colorado, and later adopted a new rate schedule designed in part to pay for such new facilities. Authoriziation for the construction of such facilities was given by the Public Utilities Commission of the State of Colorado and the Nebraska Power Review Board. Both agencies were informed of the proposed rate and made no objection thereto. The Wyoming Public Service Commission, however, took the position that the rate increase could not be permitted in Wyoming because no facilities were planned for that state, and it therefore directed that the prior rate remain in full force and effect. It also directed Tri-State's Wyoming members not to pay the new rate. Thus Tri-State was in the position of having been authorized by two state agencies to construct needed facilities in those states, but having a third state agency interfere with its collection of revenue needed to pay for such facilities. A single regional or national type of regulation, such as that afforded by the Federal Power Commission, is needed to avoid such dilemmas.

The aforesaid actions of the Wyoming Commission prompted the filing by Tri-State of a complaint, seeking an injunction against such interference, in the United States District Court for Wyoming, which Court refused to grant the relief requested. Tri-State has appealed this decision to the Court of Appeals for the Tenth Circuit, which appeal is presently pending before that Court, being No. 9252, *Tri-State Generation and Transmission Association, Inc. v. The Public Service Commission of Wyoming*

et al. All briefs have been filed and oral argument was presented to the Court of Appeals on July 10, 1967. Raised in the Court of Appeals was the question of whether the Wyoming Commission or the Federal Power Commission, or either or both of them, had jurisdiction over the wholesale rates charged by Tri-State to its members. Tri-State answered this question by pointing out that it had, on July 5, 1967, transmitted to the Federal Power Commission, as an initial filing of rates under Sec. 205(c) of the Federal Power Act, copies of its wholesale power agreements with its members, and also certain supporting data including its schedule of rates charged to such members. By letter of July 12, 1967, all of said material was returned to Tri-State by the Federal Power Commission, the Secretary of the Commission pointing out as follows:

> "By opinion No. 511 issued January 5, 1967, *Dairyland Power Cooperative, et al.,* the Commission determined that cooperatively-owned electric suppliers financed in whole or in part by the Rural Electrification Administration do not fall within the scope of this Commission's regulatory jurisdiction as public utilities within the meaning of Section 201 of the Federal Power Act.
>
> "On the basis of the legal conclusions set forth in *Dairyland,* your submittals are not accepted for filing . . . .".

3. The opinion in *Dairyland* was the basis of the Federal Power Commission's opinion in Docket No. E-7306, *Re Salt River Project et al.,* which opinion was affirmed by decision of the Court of Appeals for the District of Columbia Circuit in Case No. 20960, *Salt River Project et al. v. Federal Power Commission et al.,* which decision is the subject of the Petition for Writ of Certiorari by Petitioners in this proceeding.

4. In *Dairyland,* the Federal Power Commission held as follows:

> "Since the generating and transmission cooperatives have become an important segment of the interstate electric industry, at least in certain parts of the country, they should not be exempt from regulation."

The Commission's decision, however, was that while such

cooperatives should not be exempt from regulation, they were nonetheless exempt under the Federal Power Act as it presently exists. In *Salt River Project et al. v. Federal Power Commission et al.*, the Court of Appeals refused to upset the aforesaid opinion of the Federal Power Commission, but it pointed out that if the Federal Power Commission had found in *Dairyland* that generating cooperatives were within its jurisdiction, then the Court would have given judicial deference to such determination.

5. In the instant case in the Court of Appeals, the Petitioners and others advanced several reasons as to why the Federal Power Commission *should* have jurisdiction over rural electric cooperatives and as to why it was felt that the Commission *had* such jurisdiction. Little if any argument was presented, however, based upon the need for rate regulation and the applicability of the sections of the Federal Power Act dealing with such regulation. It is apparent that the position of Petitioners in this Court is not any different, as demonstrated by their Petition for Writ of Certiorari, and accordingly, it is believed that the brief which Tri-State is requesting permission to file will contain the only argument devoted to the rate jurisdiction issue. The need and the desirability of Federal Power Commission jurisdiction over rates of G and T cooperatives, particularly because of the diversity and lack of state jurisdiction over rates in many instances, and the parts of the Federal Power Act relating to rate jurisdiction, are matters on which this Court should be informed.

6. In the instant case in the Court of Appeals, several parties were permitted to intervene, among them being the Minnkota Power Cooperative, Inc.; Dairyland Power Cooperative; and the Committee of Rural Electric Cooperatives, Seven Statewide Associations of Rural Electric Cooperatives, and Eighty-Three Rural Electric Cooperatives. None of these cooperatives or associations thereof represent Tri-State or its views in this proceeding or the views of those rural electric cooperatives which favor Federal Power Commission jurisdiction, and all of these intervenors appeared in opposition to Federal Power Commission jurisdiction. Also permitted to intervene in the Court of Appeals were Holy Cross Electric Association, Inc., and

Empire Electric Association, Inc., and while both of these cooperatives intervened in support of Federal Power Commission jurisdiction, neither of them is engaged in the generation and transmission of electric energy nor could either of them be considered as a G and T. Consequently, it is anticipated that of the parties before this Court in support of Federal Power Commission jurisdiction, there will be only one G and T supporting such jurisdiction, namely, Arkansas Valley G & T, Inc., but it is not expected to present to the Court any argument based upon the rate jurisdiction issue. Consequently, unless Tri-State is permitted to appear as an amicus curiae, it is anticipated that no argument will be presented by any party in support of Federal Power Commission jurisdiction over the rates of interstate G and T's. For these reasons, it is apparent that there will be no adequate representation of the interests of Tri-State by any party to this proceeding.

7. The determination by this Court of the issues involved in this proceeding, if certiorari is granted, will be of great significance not only to the parties before the Court, but also to Tri-State and to every rural electric G and T in the country, and indeed, indirectly to every consumer of electric energy in these United States. The issues involved are truly substantial and of great public importance. This was emphasized in the dissent of Commissioner Bagge in *Dairyland* when he commented as follows:

> "This controversy . . . involves no idle academic exercise. It has real significance to the Nation. Its implications are exceedingly broad."

For these reasons it is respectfully asserted that Tri-State should be granted leave to file a brief as *Amicus Curiae* in the instant proceeding.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 184

ARKANSAS VALLEY G & T, INC., et al., Petitioners

v.

FEDERAL POWER COMMISSION, et al., Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT ANSWER OF RESPONDENT RURAL ELECTRIC COOPERATIVES IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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JOINT ANSWER OF RESPONDENT RURAL ELECTRIC COOPERATIVES IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Dairyland Power Cooperative, Minnkota Power Cooperative, Inc., and Committee of Rural Electric Cooperatives, Respondents in the above-captioned cause, oppose the motion of Tri-State Generation and Transmission Association, Inc. for leave to file a brief *amicus curiae* in this case in support of the petition for a writ of certiorari.

In support of their opposition to Tri-State's motion, Respondent Rural Electric Cooperatives show:

1. Tri-State advises this Court that it is involved in litigation, in which it has thus far been unsuccessful, with the Wyoming Public Service Commission respecting that commission's jurisdiction over Tri-State's electric rates for sales made in Wyoming to Tri-State's members (Tri-State Motion, pp. 2-3).

2. Tri-State also advises this Court that its controversy with the Wyoming Commission is now before the United States Court of Appeals for the Tenth Circuit on appeal by Tri-State from an adverse ruling by the United States District Court for Wyoming. Following briefs and oral argument, the Tenth Circuit is considering "the question of whether the Wyoming Commission or the Federal Power Commission or either or both of them" have jurisdiction over the rates. (Tri-State Motion, p. 3.) It is the understanding of the Respondent Rural Electric Cooperatives that the case before the Tenth Circuit does not involve the question of FPC jurisdiction, but assuming it does, it is evident that Tri-State's "problem" (Motion, p. 2) should be decided in the Tenth Circuit where it was properly submitted for decision by Tri-State by its own action. Tri-State should not be permitted to inject its "problem" into this case.

3. Tri-State is concerned that the petitioners in this case will not argue, as Tri-State believes they should (Motion, pp. 4-5), that Federal Power Commission jurisdiction over interstate rates of REA rural electric cooperatives engaged in the generation and transmission of electric energy is necessary. Tri-State's disagreement with petitioners on the arguments they should make is not a ground for an *amicus brief*. The petitioners are ably represented by counsel who can be relied upon to present the factual and legal arguments they deem relevant to the issue petitioners seek to present to this Court.

4. Moreover, there is good reason for petitioners' restraint, for as the court of appeals correctly held (Pet. for Cert., App. A-I, pp. 6a-7a):

> "Though REA regulation and supervision of cooperatives are, in many respects, far more comprehensive than that which the Federal Power Commission exercises over investor-owned utilities, there are certain areas, such as rate-making, where the cooperatives enjoy a freer hand. But it is in these areas that, by their structural nature, the cooperatives are effectively self-regulating. They are completely owned and controlled by their consumer-members, and only consumers can become members. They are non-profit. Each member has a single vote in the affairs of the cooperative, and service is essentially limited to members. No officer receives a salary for his services and officers and directors are prohibited from engaging in any transactions with the cooperative from which they can earn any profit." (footnote omitted)

5. Tri-State's participation in this case will confuse, rather than sharpen, the issue presented by the petitioners and will not be of assistance to the Court.

WHEREFORE, the Respondent Rural Electric Cooperatives oppose Tri-State's motion for leave to file a brief *amicus curiae* and pray that it be denied.

Respectfully submitted,

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July 5, 1968

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 184

ARKANSAS VALLEY G & T, INC., et al., Petitioners,

v.

FEDERAL POWER COMMISSION, et al., Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Joint Brief in Opposition for Respondents Dairyland Power Cooperative, Minnkota Power Cooperative, Inc., and Committee of Rural Electric Cooperatives, Seven Statewide Associations of Rural Electric Cooperatives and Eighty-Three Rural Electric Cooperatives

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OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. A-I, pp. 1a-15a) is reported at 391 F.2d 470. The order of the Court of Appeals denying rehearing is printed as Appendix A-II (p. 16a) to Petitioners' petition for a writ of certiorari. The order of the Federal Power Commission ("Commission") is reported at 37 FPC 495 (Pet. App. A-III, pp. 17a-21a). The order of the Commission denying rehearing and motion for stay is printed as Appendix A-IV to the petition for a writ of certiorari (pp. 22a-25a). The opinion of the Commission in *Dairyland*

Power Cooperative, et al., upon which the Commission relied as authority for its order in this case, is reported at 37 FPC 12.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1968 (Pet. App. A-I, p. 1a). Rehearing was denied on March 14, 1968 (Pet. App. A-II, p. 16a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether rural electric cooperatives financed by loans from, and under the supervision and control of, the Rural Electrification Administration ("REA"), which may be engaged in the sale or transmission of electric energy in interstate commerce, are subject to the Commission's jurisdiction under Parts II and III of the Federal Power Act ("Power Act") as "public utilities" as that term is defined in the Act.[1]

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[1] The Commission's ruling that REA-financed rural electric cooperatives are not subject to Parts II and III of the Federal Power Act was based on two separate, alternate grounds: (1) that rural electric cooperatives are not "public utilities" within the meaning of Parts II and III of the Act; (2) that they are instrumentalities of the United States within the meaning of Section 201(f) and are, therefore, exempt from Commission jurisdiction, since Section 201(f) provides that Parts II and III of the Act shall not apply to them. (Pet. App. A-III, p. 17a); *Dairyland Power Cooperative, et al.*, 37 FPC at 15, 17. The Court of Appeals affirmed the Commission's order on the first ground and did not reach the second ground.

STATUTES INVOLVED

Relevant portions of the Federal Power Act, 49 Stat. 838, 16 U.S.C. 791a-825r, are printed as Appendix B to the petition for a writ of certiorari (pp. 25a-38a).

STATEMENT

1. The Petitioners

Petitioners are four of the thirteen member-owners[2] of Colorado-Ute Electric Association, Inc. ("Colorado-Ute"), "a Colorado non-profit cooperative association", engaged in the generation and transmission of electric power and energy for sale only to its members which own and control Colorado-Ute and its electric system which was financed "by loans advanced by the Rural Electrification Administration" ("REA") (R. 6, 7-9[3]). The member-owners of Colorado-Ute, with one exception, are REA-financed rural electric cooperatives, engaged in the transmission or distribution and sale of electric energy to their consumer-owners in Colorado, New Mexico, Utah, and Wyoming (R. 6-9). The exception is Salt River Project Agricultural Improvement and Power District ("Salt River Project"), a political subdivision of the State of Arizona, which sells electric energy to consumers in central Arizona (R. 5-6, 12).

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[2]In addition to Petitioners, the member-owners are San Miguel Power Association, Inc., White River Electric Association, Inc., Holy Cross Electric Association, Inc., Grand Valley Rural Power Lines, Inc., Empire Electric Association, Inc., Delta-Montrose Rural Power Lines Association, San Luis Valley Rural Electric Association, Inc., Bridges Valley Electric Association, Inc., and Salt River Project Agricultural Improvement and Power District (R. 5-9).

[3]References are to the numbers appearing at the bottom of each page of the Joint Appendix filed by Petitioners with their petition in this Court.

2. Background of Commission Proceeding

In February, 1966, the Colorado Supreme Court set aside (R. 15) a certificate of public convenience and necessity issued by the Colorado Public Utilities Commission to Colorado-Ute for the construction and operation of the Hayden electric generating plant and related transmission facilities. *Western Colorado Power Company v. Public Utilities Commission of Colorado*, 159 Colo. 262, 411 P.2d 785, reversing *Re Colorado-Ute Electric Association, Inc.*, 48 PUR 3d 113. Rehearing was denied by the Colorado Supreme Court (159 Colo. 301, 411 P.2d 805), and this Court denied review. *Colorado-Ute Electric Association v. Western Colorado Power Company*, 385 U.S. 22 (1966). The decision rendered the certificate "null and void" (R. 15) and required Colorado-Ute to cease operating the plant which, by then, had been constructed and was delivering power and energy to Colorado-Ute's members.

3. Proceedings Before the Commission

Having failed to reverse the Colorado Supreme Court through recourse to this Court in a final effort to nullify the Colorado Supreme Court's decision (App. A-I, p. 3a), nine of the thirteen member-owners of Colorado-Ute, including the Petitioners, filed a "friendly" (App. A-I, p. 3a) "Petition and Complaint" with the Commission against Colorado-Ute. In their "Petition and Complaint" they sought an order from the Commission asserting jurisdiction over Colorado-Ute as a "public utility" within the meaning of Parts II and III of the Federal Power Act ("Act"),[4] requiring it to file its rate

[4]Under Parts II and III of the Act, a "public utility" is a person who owns and operates facilities for the transmission or sale of electric energy for resale in interstate commerce for ultimate distribution to the public, and is not exempted from Commission jurisdiction by Section 201(f) of the Act which excludes from the coverage of Parts II and III "the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing. . ." (Sections 201(a), (b), (e), (f)).

schedules for the transmission and sale of electric energy, and requiring it to continue operation of the "Hayden Plant, *the decision and order of the Supreme Court of Colorado to the contrary notwithstanding*"[5] (R. 18-19; italics supplied).

In its answer to the "Petition and Complaint", Colorado-Ute neither admitted nor denied its status as a "public utility" as defined in the Power Act (R. 27). Colorado-Ute requested the Commission to determine its status (R. 28), and, subject to that determination tendered to the Commission for filing its contracts and rate schedules with its members (R. 32-35). On motion of the complainants before the Commission, with the concurrence of Colorado-Ute, the question of its status was presented to the Commission on the pleadings for a "final" decision without intermediate reference of the case to a hearing examiner (R. 29-31).

On January 6, 1967, relying on its decision issued the day before in *Dairyland Power Cooperative, et al.*, Opinion No. 511, 37 FPC 12, the Commission, with one Commissioner dissenting, found that Colorado-Ute "is not a 'public utility' within the meaning of that term as used in Section 201 of the Federal Power Act", and, in accordance with that finding dismissed the petition and complaint and directed its Secretary to return to Colorado-Ute the proffered contracts and rate schedules (R. 51-55).

The complainants before the Commission filed a timely application for rehearing and motion for stay (R. 56-83), which the Commission denied on March 3, 1967 (R. 113-115). By separate order, issued the same day, the Commission granted the petitions for leave to intervene, in

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[5] In filing the "Petition and Complaint", they apparently hoped that Commission jurisdiction over Colorado-Ute as a "public utility" and over its sales of Hayden-generated electric energy would make inapplicable the Colorado law certificate requirements to the plant. (App. A-I, p. 3a, note 3.) As the Power Act makes clear, however, the Commission's jurisdiction does not apply to "facilities used for the generation of electric energy" (Section 201(b)).

support of the Commission's order, of Dairyland Power Cooperative ("Dairyland"), Minnkota Power Cooperative, Inc. ("Minnkota"), a group consisting of a Committee of Rural Electric Cooperatives, Statewide Associations of Electric Cooperatives and Eighty-three Rural Electric Cooperatives, and the Secretary of Agriculture (R. 84-112).

4. The Dairyland Case

At the time the member-owners of Colorado-Ute filed their "Petition and Complaint", there was pending before the Commission a proceeding commenced on July 22, 1963, by the issuance of an order against Dairyland, Minnkota, and South Central Rural Electric Cooperative, Inc. ("South Central"), each a nonprofit REA-financed rural electric cooperative, to show cause why they and other REA-financed rural electric cooperatives that may be engaged in the transmission or sale of electric energy for resale in interstate commerce should not be declared to be "public utilities" under Parts II and III of the Power Act and required to comply with the Commission's reporting, accounting and rate schedule filing requirements. *Dairyland Power Cooperative, et al.*, Docket No. E-7113, Order to Show Cause, issued July 22, 1963.

Extensive hearings were held before a Commission Hearing Examiner and comprehensive briefs were filed by Dairyland, Minnkota, and South Central in which they showed, for numerous reasons set forth in their briefs, that REA-financed nonprofit rural electric cooperatives are not "public utilities" under the Act even if they own or operate facilities for the transmission or sale of electric energy for resale in interstate commerce. The same position was taken in briefs filed by the Secretary of Agriculture on behalf of REA, by a Committee of Rrural Electric Cooperatives and several hundred Cooperatives which had been granted leave to intervene as parties to the proceeding.

On January 5, 1967, the Commission issued its Opinion No. 511 in *Dairyland Power Cooperative, et al.*, Docket No.

E-7113, 37 FPC 12 (1967), in which the Commission found and determined that cooperatively-owned electric suppliers financed by the REA do not fall within the scope of the Commission's regulatory jurisdiction over "public utilities" within the meaning of that term in Section 201 of the Act. In a carefully-reasoned, well-documented opinion, the Commission, in a 4 to 1 decision, held that Parts II and III of the Act were directed to privately-owned companies which hold themselves out to render a public service and do not include REA-financed nonprofit rural electric cooperatives.

The Commission reviewed the extensive and rigid supervision and control of the REA Administrator under the Rural Electrification Act over cooperative borrowers and found that the conflicts that the assertion of Commission jurisdiction over cooperatives as "public utilities" would create, confirmed and enforced the conclusion that REA-financed cooperatives were not to be regulated by the Commission (37 FPC at 18, 21-22, 24). Accordingly, the Commission dismissed the order to show cause, saying (37 FPC at 15):

> In our opinion, Congress never intended this Commission to regulate cooperatives under the Federal Power Act. This intention is reflected in the legislative history of the Federal Power Act, is confirmed by the legislative history of the Rural Electrification Act, is strengthened by subsequent expressions by the Congress and is ratified by this Commission's legislative interpretation. Over the past 30 years, these factors compel the conclusion that cooperatives financed by REA are not public utilities within the meaning of Part II of the Federal Power Act.

As a separate, alternate ground for its decision, in reliance on Section 201(f) of the Power Act which exempts instrumentalities of the United States from Commission jurisdiction, the Commission held that the REA cooperatives as "the instrumentalities chosen by Congress for the purpose of bringing abundant, low cost electric energy to rural America" are within its exemption (37 FPC at 18).

5. The Court of Appeals' Affirmance of the Commission's Orders

Following denial of rehearing and stay, eight of the nine complainants before the Commission filed a timely petition for review of the Commission's orders of January 6 and March 3, 1967, in the United States Court of Appeals for the District of Columbia Circuit.

After oral argument before the Court of Appeals, the threat to the Hayden Plant, which was the reason for the proceeding before the Commission, disappeared. As the result of agreements reached by Colorado-Ute and the power companies which had fought certification of the Hayden Plant, they withdrew their opposition to the continued operation of the plant. On application of Colorado-Ute to the Colorado Commission, reflecting the arrangements between Colorado-Ute and the power companies, the Colorado Commission issued a second certificate for the continued operation of the plant. *Colorado-Ute Electric Association,* Applications Nos. 22882 and 22905, Decision No. 70608, issued December 22, 1967.

The court below did not regard the case as moot, however, and on February 15, 1968, in a unanimous opinion, affirmed the Commission's orders "on the ground that Colorado-Ute, as an REA-financed cooperative, is not a public utility within the meaning of Parts II and III of the Federal Power Act" (Pet. App. A-I, p. 7a). The Court of Appeals noted, but did not pass, or rely on, the Commission's separate, alternate ground for disavowal of jurisdiction, namely, that REA-financed cooperatives are exempt from the coverage of the Power Act as instrumentalities of the Federal government within the scope of Section 201(f) of the Power Act (Pet. App. A-I, p. 7a).

The Court of Appeals first examined the nature of the REA-financed rural electric cooperatives and their relationship to REA. The court below observed that there are

almost 1,000 REA-financed non-profit cooperatives,[6] organized and owned by their consumer members, of which about 45 "own and operate electric generating plants as well as transmission systems", and the "remainder simply own and operate distribution systems" to provide "electricity to those sparsely settled areas which the investor-owned utilities had not found it profitable to service" (Pet. App. A-I, pp. 5a, 6a).

The Court of Appeals noted that REA, through its lending authority, "exercises extensive supervision over the planning, construction and operation of the facilities it finances" (Pet. App. A-I, p. 6a), requiring REA approval of the cooperative's manager, engineer, and counsel; of its construction contracts and contracts for purchase of materials, equipment and supplies; of its contracts for the purchase and sale of power; of its insurance coverage; of its purchase of land; and of many other matters (Pet. App. A-I, p. 6a).

Because REA's concern "is not only with providing high standards of electric service and guaranteeing its loan, but also with reducing the cost of service to the cooperatives' consumers", the Court of Appeals pointed out that REA "furnishes retail rate schedules designed for rural use and assists distribution cooperatives in obtaining electric energy at reasonable costs." (Pet. App. A-I, p. 6a.)

Although the court below regarded "REA regulation and supervision of cooperatives" as "in many respects, far more comprehensive than that which the Federal Power Commission exercises over investor-owned utilities", in the area of "rate-making", it acknowledged, "the cooperatives enjoy a freer hand." (Pet. App. A-I, p. 6a.) "But", the court below said (Pet. App. A-I, pp. 6a-7a):

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[6] As of March 31, 1968, REA reports there were 924 active REA-financed cooperatives. USDA, REA, *Quarterly Statistical Bull.*, Electric Program, No. 247, March, 1968. Petitioners erroneously state (Pet., p. 8, note 9) that the number of REA-financed cooperatives was 1103 in 1967.

it is in these areas that, by their structural nature, the cooperatives are effectively self-regulating. They are completely owned and controlled by their consumer-members, and only consumers can become members. They are non-profit.[6] Each member has a single vote in the affairs of the cooperative, and service is essentially limited to members. No officer receives a salary for his services and officers and directors are prohibited from engaging in any transactions with the cooperative from which they can earn any profit.

[6]Most of them have devolved a 'capital credits' plan by which all money over and above that required for operating costs is credited back to the member-owners who paid it in. Consequently, neither the cooperative nor any individual can profit from the sale of electricity by the cooperative to its members.

The Court of Appeals held that in enacting Parts II and III of the Power Act, Congress was not concerned with these "peculiar entities, obviously quite unlike investor-owned utilities and subject to comprehensive regulation by another branch of the federal government" (Pet. App. A-I, pp. 7a, 10a-11a). Rather, the Act was aimed at the elimination of financial abuses and rate practices "associated exclusively with investor-owned utilities" which jeopardized investors and extracted excessive utility rate charges from consumers (Pet. App. A-I, pp. 10a-11a). In contrast, the Rural Electrification Act "then lurking in committee" and "conceived contemporaneously" was not enacted in "response to a need for reform in an immense and corrupted industry, but rather constituted simply an attempt, through rural electrification cooperatives, to bring economical electric power to the nine out of ten farms that were then without it" (Pet. App. A-I, p. 11a). The "two Acts were aimed at wholly disparate problems and the supervisory agencies established under them were to deal with fundamentally different sorts of utilities" (Pet. App. A-I, p. 11a).

The Court of Appeals noted (Pet. App. A-I, p. 12a) that "if REA cooperatives were to be made subject to Commis-

sion jurisdiction, Commission conflict with the authority of the Rural Electrification Administration was inevitable." Because of this "inevitable" conflict, the court found in "the congressional unconcern with the impact of the" Power Act on the Rural Electrification Act, and in the fact that "the statutes are directed at very different problems", strong support for "the Commission's position that it is without jurisdiction over REA-financed cooperatives under Parts II and III of the Act" (Pet. App., p. 12a). Congress' "apparent indifference" indicated to the court below that REA-financed cooperatives under the Administrator's jurisdiction "were not intended to fall within" the jurisdiction "of the Commission" (Pet. App. A-I, p. 12a).

Finally, the court below found support for the Commission's interpretation in its administrative practice of over 30 years under the Power Act in which it never sought to exercise general authority over REA-financed cooperatives, and in the fact that despite repeated efforts to secure the enactment of legislation to subject REA-financed cooperatives to Commission controls, Congress never enacted them (Pet. App. A-I, pp. 13a-14a).

ARGUMENT

1. The legislative evidence[7] is overwhelming that Congress in enacting Parts II and III of the Federal Power Act intended to reach only the investor-owned, profit-making, sector of the electric utility industry because of the financial abuses exposed by the Federal Trade Commission investigation which had "taken sums beyond calculation from the rate-paying and investing public." (*Summary Report of Federal Trade Commission*, No. 73-A, (S. Doc. No. 92, Part 73-A), 70th Cong., 1st Sess., p. 63). To eradicate these abuses, which were beyond the reach of the States

[7] H. Rep. No. 1318, 74th Cong., 1st Sess. on S. 2796; S. Rep. No. 621, 74th Cong., 1st Sess. on S. 2796; Hearings on the Public Utility Act of 1935, House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., pp. 391, 424, 437-438, 481, 517, 537-541, 543.

because the electric utility companies had spread across state lines and interstate commerce was involved, Congress passed the Public Utility Act of 1935. Title I of that Act conferred on the Securities and Exchange Commission power to deal with the abuses arising from the holding company structure which then prevailed in the utilities industry. Title II of the Act, comprising Parts II and III of the Power Act, empowered the Commission to deal with the abuses on the operating company level. The Commission was armed with authority to protect the consumers of electric energy by assuring them electric service at reasonable rates and to protect the investors by assuring them sound securities, depreciation and accounting practices. These were the two primary immediate objectives of the Act. *Hearings on the Public Utility Act of 1935, Committee on Interstate and Foreign Commerce, House of Rep., 74th Cong., 1st Sess., p. 391.* As the Commission put it in its *Dairyland* decision (37 FPC at 15):

> . . . The purpose of that legislation was most clear: it was designed to prevent the notorious investment and profit abuses which had developed in the industry under the domination of the holding companies. This is evident on nearly every page of the legislative history. The entire focus of this legislation was directed to the privately-owned companies which held themselves out to render a public service. . . .[8]

Petitioners do not challenge this. They agree (Pet., p. 19) "that there was no need for regulation of cooperatives existing at the time of the passage of the Federal Power Act." "Indeed", Petitioners acknowledge (Pet., p. 19), "there were no cooperatives owning and operating jurisdictional facilities at that time."

Nor do Petitioners assert (Pet., p. 20 and note 33) that there is a need today for regulation by the Commission under

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[8] The Court of Appeals put it this way (Pet. App. A-I, p. 11a):

> . . . the attention of the 74th Congress, in enacting the Federal Power Act, was focused on the sorts of evils associated exclusively with investor-owned utilities.

the Power Act of all of the 924 REA-financed rural electric cooperatives, even though some of them may be engaged in interstate commerce.[9] Petitioners argue only that since 1963 there has been a need for Commission regulation under Parts II and III of the Power Act because by that time there were 43 generation and transmission cooperatives[10] ("G&T Coop-

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[9]For example, San Miguel Power Association, Inc., a complainant before the Commission and a petitioner in the court below, but not here, is engaged in the "transmission, distribution, and sale of electric power and energy to its consumers" in "the State of Colorado . . . and . . . in the State of Utah" (R. 6-7). So, also, La Plata Electric Association, Inc., another complainant before the Commission and a petitioner in the court below and here, is "engaged in the transmission, distribution and sale of electric power and energy to its consumers" in "the State of Colorado, and . . . in the State of New Mexico" (R. 6). Yampa Valley Electric Association, Inc., also a complainant before the Commission and a petitioner in the court below and here, is engaged in "the purchase, distribution and sale of electric power and energy to its consumers . . . in the State of Wyoming and . . . in the State of Colorado." (R. 8) Each of these REA-financed rural electric cooperatives purchases electric energy having out-of-state origin (R. 11, Par. No. 5; R. 12-13, Par. Nos. 7 and 8).

[10]The first G&T Cooperative was organized in 1937. By 1954 more than half of the 43 G&T Cooperatives were in existence, and 20 of the 32 G&T Cooperatives having generating facilities. Despite the name, each G&T Cooperative does not own and operate generating facilities. In 1966, the latest year for which published statistics are available, 25 of them owned and operated their generating facilities, 7 owned but did not generate energy in 1966, relying entirely on purchased power to meet their members' requirements, and 11 owned no generating facilities, also relying on purchased power to meet member requirements. Rural Electrification Administration, U.S.D.A., *1966 Annual Statistical Report, REA Bull. 1-1*, pp. 248-257. The G&T Cooperatives are scattered over 17 states; about 24 being located in the Midwest. *Id.* The total generating capacity of the G&T Cooperatives was 2,316,046 kw or about 1.2% of the generating capacity (158,576,000 kw) of Class A and B (those having annual electric revenues of $1,000,000 or more) investor-owned electric utilities. In 1965, the generating capacity of municipally-owned electric utilities, which are exempt from the Power Act (Section 201(f)), was 19,106,057 kw. Federal Power Commission, *Statistics of Electric Utilities in the United States, Publicly-Owned*, 1965, Table 15, p. XV. When the

eratives") (Pet., pp. 19-20.[11]

2. As heretofore noted, the objectives of the Power Act were two-fold: (1) to reach and eradicate the financial abuses prevalent in the investor-owned sector of the electric companies; and (2) to assure consumers of electric energy service at reasonable rates. Petitioners do not suggest, and they could not, that rural electric cooperatives, including G&T Cooperatives, financed entirely by REA and subject to REA's close supervision and control, have engaged in financial abuses which require the regulatory intervention of the Commission. The petition will also be searched in vain for any suggestion by Petitioners that Commission rate regulation is necessary to assure reasonable rates to customers of these REA-financed G&T Cooperatives.

The G&T Cooperatives with generating facilities were organized by distribution cooperatives in some parts of the country to free them of their dependence upon purchased power for their power requirements and to achieve lower power costs.[12] Other G&T Cooperatives were organized by

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generating capacity of these municipally-owned projects, of federal projects, and of small investor-owned electric utilities are considered, the 1.2% becomes an infinitesimal percentage of the electric industry's generating capacity.

[11] On the basis of the definition of "public utility", without regard to other considerations, Petitioners argue that the Power Act applies to G&T Cooperatives. On that same basis, the Power Act would also apply to REA-financed cooperatives that do not generate electric energy but are engaged in interstate transmission or sale of energy. Inconsistently, however, Petitioners would not apply the Power Act to them, apparently on the basis of considerations beyond the mere definition of "public utility".

[12] Petitioners concede (Pet., pp. 9-10) that "generation and transmission cooperatives have substantially enhanced the competitive position of rural electric systems in their negotiations with commercial power companies for wholesale power. Their continuation as a viable segment of the electric industry is essential." This has occurred under the supervision and control of REA. Commission regulation is obvi-

distribution cooperatives to achieve lower purchased power costs by combining their power requirements for purchase purposes. The G&T Cooperatives have secured purchase and pooling arrangements which are mutually beneficial to the cooperatives, the power companies and the ultimate consumers.[13] The G&T Cooperatives are consumer-owned and controlled. They operate on a non-profit basis and are self-regulating. There is no motive to overcharge. If the rates produce more than the cost of service, the same consumers own and ultimately recover these margins and pass them on to the ultimate consumers.[14]

3. The fact that G&T Cooperatives are not subject to Commission jurisdiction does not mean that there is a regulatory void, as Petitioners argue (Pet., p. 10). As noted earlier in this brief, *supra*, pp. 7, 9, the rural electric cooperatives, G&T Cooperatives included, in every aspect

ously not required to assure their continuation "as a viable segment of the electric utility industry". In fact, one may wonder, in light of the difficulties of Colorado-Ute and its Hayden Plant, whether this would have come to pass and whether generation and transmission cooperatives could remain a "viable segment of the electric utility industry" if power companies secure the Commission as a forum to harass and impede the cooperatives. This is no reflection on the Commission or its intentions; this is merely a statement of a fact of life.

[13] By reason of the Commission's jurisdiction over the power companies, these transactions are subject to the Commission's regulatory control and scrutiny under Section 205 of the Power Act as to rates and the terms and conditions of the transaction.

[14] Petitioners argue (Pet., p. 21) that G&T Cooperatives are not effectively self-regulating because in a number of situations some of the G&T Cooperatives sell electric energy to non-members. These sales are minor and do not alter the fact that essentially the G&T Cooperatives are consumer-owned. Revenues from sales to non-members are only 6.1% of the total sales revenues of G&T Cooperatives. Some of these sales may not be in interstate commerce, but to the extent that they are and are involved in pooling arrangements, they are subject to Commission control under Parts II and III through Commission regulation of the power companies. The incidental transactions with non-members do not support Petitioners' claimed need for Commission regulation of the G&T Cooperatives.

of their activities, are subject to the control and supervision of REA, which is "in many respects, far more comprehensive than that which the Federal Power Commission exercises over investor-owned utilities" (Pet. App. I-A, p. 6a). REA control and supervision, rather than Commission control, was the deliberate choice of Congress,[15] and was consistent with its desire to give the REA Administrator "almost unlimited discretion" and "extraordinary power" to "oversee effectively the rural electrification program", 80 Cong. Rec. (Part 3) 3308, 3313 (1936); 80 Cong. Rec. (Part 5) 5277, 5281 (1936); Pet. App. A-I, p. 12a.[16] Since then Congress has time and again rebuffed attempts either to make the REA's authority in some way subject to Commission jurisdiction or to otherwise restrict it.[17] Most recently, bills were introduced as the result of the Commis-

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[15]Congress' deliberate choice of REA control and supervision over REA-financed cooperatives and the existence thereof, distinguishes this case from *Southwestern Cable* (*United States v. Southwestern Cable Co.*, 36 L.W. 4553 (June 10, 1968)), where, absent FCC jurisdiction over CATV Systems, a regulatory void would have existed which would jeopardize achievement of the goals of the Communications Act of 1934.

[16]In a letter to the Committee on Forestry and Agriculture, dated February 17, 1936, commenting on the Rural Electrification Act of 1936, then pending before the Congress, the Commission never suggested that the Federal Power Act conferred any jurisdiction over cooperatives on the Commission. It referred only to the fact that the pending legislation "proposed duplication of functions now delegated to this Commission" in that the bill authorized the Administrator to make certain studies and investigations respecting the progress of rural electrification. The Commission advised that the Federal Power Act delegated to the Commission similar responsibility. It is unlikely that if the Federal Power Act conferred other areas of authority over rural electric cooperatives on the Commission that it would have remained silent as to those and would have mentioned only a minor duplication in the field of reports. Congress, desirous of giving the Administrator a free hand, ignored the duplication and made no change in this provision of the Rural Electrification Act.

[17]H.R. 6292, 76th Cong., 1st Sess., 1939—a bill to require Commission determination that a generating plant would result in lower

sion's show cause order in the *Dairyland* case, *supra*, to confirm that cooperatives are not subject to Commission jurisdiction. Introducing S. 2028 bill, Senator Humphrey stated:

> The law is clear. We would not need new legislation except for the stubbornness of some people who are pursuing an illegal course in the face of the provisions of the law in this case, as expressly stated by Congress. 109 Cong. Rec. (Part 11) 14533 (1963). See also the debate on S. 1459, 111 Cong. Rec. (Part 16) 22018-22034 (1965).

4. If G&T Cooperatives were subject to Commission jurisdiction, inevitable and irreconcilable conflicts between REA and the Commission would prevail in many areas of the cooperatives' operations, including rates, accounting, financing, acquisition and disposition of property, and extension of service. (*Dairyland*, 37 FPC at 21). The existence of these conflicts argues strongly against Commission jurisdiction. On this subject, the Commission in *Dairyland* correctly said (37 FPC at 26):

> . . . The record in this proceeding is replete with evidence on the question of the exact extent to which the Administrator exercises authority over cooperatives which would conflict with what the Commission requires under its statutory mandate. It is not for us to resolve this conflict. Congress has

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cost electricity before REA could make a loan therefor. No action on the bill. (84 Cong. REC. 5480)

H.R. 5555, 79th Cong., 2d Sess., 1946—a bill to require consent of the Commission in the absence of state jurisdiction before REA could make a generating plant loan. No action on the bill. (92 Cong. Rec. 1571)

H.R. 2709, 80th Cong., 1st Sess., 1947—a bill similar to H.R. 5555, *supra*. No action was taken on the bill. (93 Cong. Rec. 2423)

House Report No. 450, Committee on Appropriations, 80th Cong., 1st Sess., May 1947—a proposal to confer upon the Commission or upon state commissions power to veto REA loans respecting generating plants. No such authority was conferred.

expressly authorized the Administrator to exercise virtually unlimited and continuing regulatory authority over the operations of cooperative borrowers, which authority has been fully exercised for over thirty years.

5. In further support of the Commission's disavowal of jurisdiction over REA-financed rural electric cooperatives is the Commission's administrative practice of over 30 years under the Act. In that long period, the Commission never decided that "cooperatives are jurisdictional" and did not seek "to exercise such jurisdiction". *Dairyland,* 37 FPC at 23-25; Pet. App. A-I, pp. 12a-13a.

Contrary to Petitioners' contention (Pet., pp. 14-15), there is no inconsistency between the Commission's long administrative interpretation, its decision in *Dairyland,* and this case on the one hand, and its finding in *Buckeye Power Inc. and Ohio Power Company,* Docket No. E-7355, Order issued August 4, 1967, that Buckeye is a "public utility". Although organized by 28 rural electric cooperatives, Buckeye was financed completely by *private* capital. It is *not* an REA-financed cooperative. As a privately-financed venture, engaged in the ownership and operation of facilities for the transmission and sale of electric energy in interstate commerce, Buckeye came within the coverage of Part II like any other privately capitalized interstate electric utility.

6. Nor is there a conflict, as Petitioner implies (Pet., pp. 16-17), between the decision of the court below and the decision of the Ninth Circuit in *City of Anchorage v. Chugach Electric Ass'n,* 252 F.2d 412 (1958) on the question whether REA-financed cooperatives are exempt from Commission jurisdiction as government instrumentalities. The Ninth Circuit held that they were not government instrumentalities. As an alternate ground for its decision, in the present case the Commission held that REA-financed cooperatives are exempt as government instrumentalities under Section 201 (f) of the Power Act. The court below affirmed the Commission's decision with respect to Colorado-Ute on the

ground that it was not a "public utility" within the meaning of Parts II and III of the Power Act. That court "carefully avoided reaching the question whether REA-financed cooperatives were also exempt as government instrumentalities under Section 201(f)". *City of Paris, Kentucky v. FPC*, CADC No. 21,375, ___ F.2d ___ (July 3, 1968). In the circumstances there is no conflict for this Court's resolution between the decision of the court below in the present case and the decision of the Ninth Circuit, or, for that matter, between the decision of the court below in this case and its decision in *City of Paris, supra*, where it held that REA-financed cooperatives are not government instrumentalities for purposes of Section 201(f) of the Act.

7. Petitioners seek support for their interpretation of the Power Act in the Commission's position before Congress that it would be in the public interest for Congress to enact legislation giving the Commission jurisdiction over interstate G&T transmission cooperatives because, it is alleged, they "have become an important segment of the interstate electric industry, at least in certain parts of the country" (Pet., pp. 11-12 and notes 17 and 18). Assuming, *arguendo*, they are,[18] the Commission, unlike Petitioners, has gone to the right forum. The Commission has recognized that the legislature is the proper forum; Petitioners have not. There the question of need for Commission regulation of G&T Cooperatives and the type of regulation[19] can be examined in a proper legislative context and a decision made.

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[18]With all deference to the Commission, the importance of the G&T Cooperatives in the electric utility industry has been overdone. *Supra*, note 10, p. 13.

[19]The Commission has never asserted a need for rate regulation. The Commission's concern appears to be in the area of planning and interconnections to assure reliability of service. Thus, in the Electric Power Reliability Bill (S. 1934, 90th Cong., 1st Sess.) which the Commission has presented to Congress for its consideration, the Commission would have jurisdiction over planning and interconnections of all segments of the electric industry: federal, state, municipal, investor-owned and REA-financed.

8. Finally, Petitioners argue that regulation by the Commission is necessary to avoid "competing and conflicting regulation by state agencies in portions of the area served" and the "piecemeal and potentially inconsistent regulatory activities by diverse state agencies which inevitably result in discrimination as between purchasers and discourage and impede the orderly, systematic and progressive development of the industry in a manner best suited to serve the public." (Pet., p. 10). Petitioners' dissatisfaction with state regulation will not be assisted through Commission regulation of the interstate activities of G&T Cooperatives, and is not a sound basis for reading into the Power Act regulation of REA-financed cooperatives that Congress never intended. This case was started in the Commission in an effort to avoid the certificate requirements of Colorado State law, although Commission jurisdiction over sales of electric energy in interstate commerce by Colorado-Ute would not necessarily make the state certificate requirements inapplicable. (Sec. 201(b)). Apparently, Petitioners' real purpose in seeking Commission regulation of cooperatives is the continued effort to eliminate state regulation. Commission regulation extends "only to those matters which are not subject to regulation by the states" (Sec. 201(a)), and does not extend to "facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." (Sec. 201(b)). These matters would remain subject to State regulation even if G&T Cooperatives were subject to Commission regulation under Parts II and III of the Power Act.

CONCLUSION

This is not a case in which the decision that the Power Act does not reach REA-financed cooperatives, leaves them unregulated, and impairs achievement of the objectives of the Power Act. REA-financed cooperatives are subject to the close supervision and control of the REA Administrator

as the result of a deliberate choice made by Congress in almost contemporaneous consideration of the Power Act and Rural Electrification Act. No objective of the Power Act requires Commission regulation, for REA-financed cooperatives have not been involved in financial abuses, and in matters of rates, they are self-regulating, being consumer-owned and operated.

The decision of the court below is correct. There is no conflict of decisions. No further review by this Court of the decision is, therefore, required. The petition for a writ of certiorari should be denied.

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July 29, 1968

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 184

ARKANSAS VALLEY G & T, INC., ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–15a) is reported at 391 F. 2d 470. The opinions of the Federal Power Commission (Pet. App. 17a–25a) are reported at 37 FPC 68, 495.

JURISDICTION

The judgment of the court of appeals was entered February 15, 1968. A timely petition for rehearing was denied March 14, 1968 (Pet. App. 16a). The petition for a writ of certiorari was filed on June 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether REA-financed cooperatives engaged in the transmission of electric energy in interstate commerce or its sale at wholesale for resale in interstate commerce are subject to the regulatory authority of the Federal Power Commission as "public utilities".

STATUTE INVOLVED

Sections 3 and 4 and portions [1] of Parts II and III of the Federal Power Act, 41 Stat. 1063, 16 U.S.C. 791a, *et seq.*, as amended, are set forth in part in the petition, App. 25a–38a.

STATEMENT

Petitioners seek review of a decision of the Court of Appeals for the District of Columbia Circuit affirming the order of the Federal Power Commission denying the application of nine of 13 member-owners—who are the only customers—of Colorado-Ute Electric Association, Inc. ("Colorado-Ute"), which asked that the Commission assert jurisdiction, under the Federal Power Act, over Colorado-Ute as a "public utility."

THE BACKGROUND

Colorado-Ute, a non-profit cooperative association organized under the laws of Colorado, and financed in large part with loans obtained from the Rural Electrification Administration, is engaged in the generation, transmission and interstate sale of electric

[1] Sections 201, 202, 205–207, 306, 307, 309, 311, 314–317.

energy at wholesale to its members who are themselves engaged in the distribution and sale of electric energy to their customer owners in five western states. Twelve of the 13 constituent members are non-profit REA cooperatives; the thirteenth, Salt River Project Agricultural Improvement and Power District ("Salt River"), is a quasi-governmental arm of the State of Arizona.

Colorado-Ute originally sold electric energy to four distribution cooperatives. The power was supplied by a steam electric generating plant constructed in 1959, and supplemented by energy bought from the United States Bureau of Reclamation (J.A. 23–24).[2] Between 1960 and 1962, the other member-owners contracted to purchase power from Colorado-Ute (J.A. 32–35, 40). The energy was, in substantial part, to be supplied by a 150,000 kw steam generation plant at Hayden, Colorado. The plant and related facilities were completed in 1965.

These facilities were constructed under a certificate of public convenience and necessity issued by the Colorado Public Utilities Commission in 1963.[3] The project was financed by an advance of approximately $10 million from Salt River (to be repaid by deliveries of electric power) and a 35-year 2 percent loan of nearly $23 million obtained from the REA (J.A. 14, 22–23). On February 14, 1966, after the facilities were completed and placed into operation, the Colorado Supreme Court directed the setting aside of the

[2] "J.A." refers to the pages of the joint appendix in the court of appeals.

[3] *Re Colorado-Ute Electric Association, Inc.*, 48 PUR 3d 113.

State Commission's certificate order, and Colorado-Ute unsuccessfully sought a review of the State Court's action by this Court.[4]

THE PRESENT PROCEEDINGS

While Colorado-Ute's certiorari petition was pending in this Court, its members, including the present petitioners, filed a "friendly" complaint against Colorado-Ute with the Federal Power Commission, alleging that the Commission has plenary jurisdiction over Colorado-Ute and seeking nullification of the State Court's decision requiring cessation of the Hayden plant operations (J.A. 2–20).[5] In its answer, Colorado-Ute requested a determination of whether it is a "public utility", and conditionally offered to file all of its rate schedules with its members and the contracts relating to them (J.A. 25–28).

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[4] *Western Colorado Power Company* v. *Public Utilities Commission*, 411 P. 2d 785, certiorari denied *sub nom. Colorado-Ute Electric Association* v. *Western Colorado Power Co.*, 385 U.S. 22. No challenge was made in that proceeding to the jurisdiction of the Colorado Commission.

[5] The complaint also prayed that the Commission assert Section 205 (rate regulation) and Section 309 (administrative powers) jurisdiction; that it investigate power pool and interconnection transmission facilities and require Colorado-Ute to continue to serve and to maintain such connections; that it inquire into the adequacy of service under Section 207 and the impact of abandonment of the Hayden facilities; that it conduct investigations under Sections 306 and 307; that it require Colorado-Ute to continue operations permanently under 202(c) notwithstanding the decision of the Colorado Supreme Court; and that it institute an appropriate suit in the federal district court under Sections 314, 316 and 317 to require continued operation of the Hayden plant.

The Commission (Pet. App. 17a–22a), relying on its decision of one day earlier in *Dairyland Power Cooperative,* 37 FPC 12, held that Colorado-Ute, as a cooperative financed in part by the REA, was not a public utility subject to its jurisdiction.[6] In *Dairyland,* the Commission had held, on the basis of the legislative histories of both the Federal Power Act and the Rural Electrification Act of 1936, the numerous subsequent Congressional expressions and the consistent interpretations of both agencies over a 30-year period, that Congress had not intended to include REA-financed cooperatives among the "public utilities" which are subject to the Commission's general regulatory authority. As an alternative ground for its decision, the Commission ruled that REA cooperatives are instrumentalities of the United States which, under Section 201(f) of the Power Act, are exempt from its regulation.

The court of appeals affirmed, holding that in view of the legislative and administrative history, the Commission had correctly interpreted the phrase "public utilities" as used in the Power Act.[7] It did not pass

[6] The Commission ordered that the rate schedules be returned to Colorado-Ute. It did not dismiss the allegations which asserted that the Commission's emergency powers under Section 202(c) of the Act might apply if service from the Hayden plant and related facilities was discontinued, inasmuch as the exercise of those powers was not limited to "public utilities" as defined in Section 201.

[7] Shortly after argument before the court of appeals, the Colorado Public Utilities Commission on December 22, 1967 (*Colorado Ute Electric Assoc.*, Decision No. 70608, not yet reported), entered an order authorizing Colorado-Ute to operate and maintain its Hayden plant. The court of appeals ruled (Pet. App. 3a) that this case had not become moot.

on the Commission's conclusion that such cooperatives are federal instrumentalities.[8]

ARGUMENT

The court of appeals properly affirmed the Commission's decision that REA-financed rural electric cooperatives are not subject to the Commission's jurisdiction as "public utilities" under the Federal Power Act. While the jurisdictional question involved has evoked considerable interest, and a contrary holding would have had a broad potential impact on the operations of such cooperatives, the decision below is correct and there is no conflict among the circuits. Moreover, no need has been demonstrated for the broad jurisdiction with which petitioners would invest the Commission, although the Commission has requested limited controls over cooperatives under the proposed Electric Reliability Act. In these circumstances further review is unwarranted.

1. In its opinion in *Dairyland,* the Commission rested its conclusion that the Federal Power Act does not grant it jurisdiction over REA-financed cooperatives largely on the legislative history, which shows that Congress, in giving the Commission jurisdiction

[8] Subsequently, in *City of Paris* v. *Federal Power Commission*, C.A.D.C. No. 21,375, decided July 3, 1968, the court of appeals held that REA cooperatives are not federal instrumentalities. There the Commission, relying on its *Dairyland* conclusion that REA-financed cooperatives are federal instrumentalities, held that it could not compel a public utility to transmit energy from an REA-financed cooperative to a third party customer because it could not order transmission on behalf of government instrumentalities under Part II of the Power Act.

over "public utilities"[9], focused entirely upon "privately-owned companies which held themselves out to render a public service", and designed the statute "to prevent the notorious investment and profit abuses which had developed in the [electric] industry under the domination of the holding companies." 37 FPC at 15; Pet. App. 10a–11a. The REA was created by Executive Order No. 7037, a few months before the Power Act was adopted. Shortly after the adoption of the Power Act, Congress passed the Rural Electrification Act of 1936 in order to foster a means of bringing electric power to vast rural areas not being served by investor-owned or municipal electric systems, Pet. App. 5a–6a. This was to be accomplished largely by providing low cost loans to cooperatives especially organized to provide, and limited to, such operations. In administering these loans, the Administrator of the REA exercises extensive supervision and control over the REA-financed electric cooperatives. (Pet. App. 6a.) [10] As the court below observed

[9] Under Part II of the Power Act the Commission's jurisdiction depends upon whether there is transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce by a "public utility." See Section 201.

[10] As the court of appeals recognized the cooperatives are effectively self-regulating as to their rates (Pet. App. 6a) since members are at the same time their customers.

There are instances of bulk sales by cooperatives to nonmembers (such as the provision for the sale of surplus energy to an investor-owned utility under the agreement which Colorado-Ute has made with Public Service Company of Colorado). But these sales produce a minor portion of the cooperatives' operating revenues. Cooperatives, to satisfy their needs, indeed must purchase substantial amounts from others. In 1967, they generated as a group only 23.3 percent of their total energy input

(Pet. App. 11a), "[t]he two Acts were aimed at wholly disparate problems and the supervisory agencies established under them were to deal with fundamentally different sorts of utilities."

The issue here, to be sure, falls within the interstices of the language of the two statutes. The overall design is, nevertheless, clear. Broad, general jurisdiction of the REA cooperatives has been given the REA Administrator, as the FPC's approach of 30 years has recognized.

The result of petitioners' construction of the Power Act would be to give two separate federal agencies overlapping control over one portion of the electric utility industry, see 37 FPC at 21–22, even though neither Act makes provision for resolution of the conflicts that would be the necessary end product of such dual jurisdiction. As the court below concluded (Pet. App. 12a), "this apparent indifference indicates that those entities under the Administrator's jurisdiction—the REA-financed cooperatives—were not intended to fall within that of the

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and purchased 32.7 percent from power companies, 37.1 percent from federal agencies, and 6.9 percent from other public agencies. REA Bulletin 111-2, *29th Annual Report of Energy Purchased by REA Borrowers*, at 7 (1968). The Department of Agriculture advises us that in 1967 only 6.1% of the total revenues of $177,272,715 received by 41 REA cooperatives was derived from sales to non-members. About half of this amount was obtained from sales to investor-owned utilities under exchange agreements required to be filed with the Power Commission and subject to its rate jurisdiction over such utilities.

Commission. If anything the emphasis in Congress was on the Administrator's need for 'almost unlimited discretion' and 'extraordinary power' if he were to oversee effectively the rural electrification program."

2. There is not, as petitioners contend (Pet. 15–17), a conflict in decisions that this Court should resolve. The only question decided below is that an REA cooperative is not subject to the general jurisdiction of the Federal Power Commission as a "public utility". We are aware of no court decision other than the present one involving this question.[11]

The conflict petitioners assert goes only to the question whether an REA cooperative is an "instrumentality" of the United States. The Commission's affirmative response provided but an alternative ground for its decision here, and the court of appeals did not reach the issue. There would be no need to consider the question upon a grant of certiorari unless the Court concluded that an REA cooperative is a "public utility" within the meaning of the Power Act.

[11] There is no inconsistency between the Commission's decision here and its order in *Buckeye Power Co., Inc.*, Docket No. E–7355, August 4, 1967 (not yet reported). Buckeye is *not* an REA-financed cooperative. In that case, the Commission was requested to, and did, allow Buckeye to enter into the sort of private financing arrangement that is not used by REA-financed systems. Buckeye is a cooperative all of whose shareholders are themselves REA cooperatives. But this fact does not subject Buckeye to any more supervision by the Rural Electrification Administration than those private utilities which sell to REA cooperatives and are, in the large, subject to FPC regulation.

Thus; the conflict—if there be one [12]—need not be resolved to dispose of this case.

3. The gravaman of this proceeding was the Colorado Supreme Court's ordered cancellation of a Colorado Commission certificate approving Colorado-Ute's construction of a large thermal generating plant at Hayden, Colorado. Prior to the court decision, the plant had been built and put into operation and much of the energy generated was being sold at wholesale in interstate commerce. The petitioners apparently hoped, as the court below noted (Pet. App. 3a, n. 3), that assertion of Federal Power Commission jurisdiction over Colorado-Ute as a public utility would render the Colorado certificate nugatory. Since the Commission has no authority to certificate steam generating facili-

[12] The Fifth and Ninth Circuits have expressed differing views on this issue but in cases not involving the FPC. Compare *Alabama Power Co.* v. *Alabama Elec. Coop.*, C.A. 5, No. 23016, decided April 2, 1968 (antitrust suit by private utility seeking to enjoin REA loan to a cooperative; characterization of cooperative as "federal instrumentality" was alternative ground for dismissal), *with City of Anchorage* v. *Chugach Elec. Ass'n.*, 252 F. 2d 412 (C.A. 9) (REA-financed cooperative not immune from local taxation).

Only *City of Paris* v. *Federal Power Commission*, C.A.D.C. No. 21375, decided July 3, 1968, considers whether an REA cooperative is a federal "instrumentality," as that word is used in the Power Act. There, the Commission declined to direct an investor-owned utility to transmit power from an REA cooperative to a third party customer on the ground that it could not compel transmission from a government instrumentality. The issue on which the instant case was decided—whether or not such a cooperative is a "public utility"—was entirely irrelevant under the applicable provision of the Power Act, Section 202(b).

ties, it is far from clear that an assertion of jurisdiction here would have achieved petitioners' objective.[13]

Whatever may be the need for more extensive federal regulation of REA cooperatives, it is not clear that the FPC should have the broad jurisdiction with which petitioners would vest it. As the Commission recognized in *Dairyland,* 37 FPC at 27–28, regulatory controls not now provided in the Power Act would be desirable in order to promote new mechanisms for regional and national coordination of bulk power systems involving the interaction of generation and transmission facilities regardless of the nature of their ownership.

But the route to that end is not through interpreting the Power Act in a manner that conflicts with the statutory scheme of giving the REA basic authority over REA-financed cooperatives. It is through further legislation, such as the pending bills which the Commission has endorsed,[14] that existing mechanisms for the coordination of electric utility systems may be strengthened. Significantly, the authority sought under that proposal does not require the unlimited exercise by the Commission of extensive regulatory authority over REA-financed cooperatives, as petitioners here urge, which would lead to duplicative and confining supervision.

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[13] Nor is the need for Commission jurisdiction shown by reference to the *Tri-State* case, now pending before the Tenth Circuit (see Pet. 7, n. 8), which petitioner contends involves a conflict of jurisdiction among State regulatory commissions over an REA-financed cooperative that only federal regulation can solve. The court of apepals has not yet decided the *Tri-State* case, and its outcome cannot be foretold.

[14] See the proposed Electric Power Reliability Act of 1967, S. 1934, 90th Cong., 1st Sess. The identical bill was introduced in the House as H.R. 10727, 90th Cong., 1st Sess.

CONCLUSION

The petition for a writ of certiorari should be denied.

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